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In The

Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (Title II), provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." The question presented is:

Whether Title II applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts.

PARTIES TO THE PROCEEDING

The Petitioners are Irving N., Dawn N., and Sandra N. The Respondent is the Rhode Island Department of Children, Youth, and Families.

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PETITION FOR A WRIT OF CERTIORARI

Irving N., Dawn N., and Sandra N., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island in this case.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court was published at 900 A.2d 1202 and is reproduced in Appendix A. The unpublished decision of the Providence, Rhode Island, Family Court is reproduced in Appendix B.

JURISDICTION

The Rhode Island Supreme Court's decision was entered on June 30, 2006. On August 24, 2006, Justice Souter granted an application to extend the time to file this petition to and including October 30, 2006. This petition is being filed within that time. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Rhode Island Termination of Parental Rights Statute, R.I. Gen. Laws § 15-7-7, are reproduced in Appendix C.

STATEMENT

1. This case involves the State of Rhode Island's termination of the parental rights of Petitioners Irving and Dawn N. to their daughter Kayla N., as well as its refusal to permit Petitioner Sandra N. to adopt Kayla. Both Irving and Dawn N., who are married, have mild mental retardation. App., *infra*, at 1a. Irving has been tested as having an IQ of 61, and Dawn has been tested as having an IQ of 64. *Id.* at 32a. Dawn has a daughter by a previous relationship, Michelle, whom the state placed in foster care; when the state filed a motion to terminate Dawn's parental rights to Michelle, Dawn gave her up for adoption to the foster family. *Id.* at 1a-2a.

In early 2000, Rhode Island's Department of Children, Youth, and Families ("DCYF") determined that Dawn was pregnant with Irving's child. *Id.* at 24a. While Dawn was pregnant, the Department concluded that Irving and Dawn could not properly parent a child, both because of Dawn's experience with her first daughter and because Dawn's mother had made threats against Irving and the unborn child. *Id.* at 2a. Accordingly, the Department asked Irving's sister, Sandra N., whether she could take in the baby after birth. *Id.* at 24a. But Sandra could not do so; at the time, she had assumed full-time care responsibilities for another brother and a niece, both of whom were in the late stages of terminal illness and were living with her. *Id.*

On April 13, 2000, Dawn gave birth to Kayla. *Id.* at 2a. DCYF did not permit Irving and Dawn to take Kayla home. *Id.* Instead, the Department placed the baby in foster care with the family that was caring for her half-sister, Michelle. *Id.* DCYF set a goal of reunifying Kayla with her parents and referred Irving and Dawn to a state

contractor, Spurwink of Rhode Island. *Id.* at 2a-3a. Spurwink provided Irving and Dawn with training in parenting skills, and it also supervised once-per-week visits with Kayla at a DCYF office. *Id.* Unlike any of the services the state would later offer Petitioners, Spurwink's services were specifically geared toward parents with intellectual disabilities. *Id.* at 3a.

In December 2000, Irving and Dawn asked the Rhode Island Family Court overseeing their case to permit supervised visits in their home. *Id.* Spurwink refused to supervise those visits, however, because of a threat Dawn had allegedly made to one of its workers. *Id.* at 3a & n.2. DCYF responded in January 2001 by terminating Spurwink's contract to provide services to Irving and Dawn; the state never explained why it did not permit Spurwink to continue its parenting services while another contractor supervised the in-home visits. *Id.* at 3a-4a, 26a.

Over the next year, the state referred Irving and Dawn to a succession of programs, none of which provided services targeted at parents with disabilities. *Id.* at 4a-5a. In February and March, the John Hope Settlement House provided weekly parent-aide services and supervised a weekly two-hour visit with Kayla in Irving and Dawn's apartment. *Id.* at 4a. In April, after it declined to renew John Hope's funding, DCYF itself began arranging two *un*supervised visits per week. *Id.*[1] In May, the state

[1] In March 2001, John Hope had sent a favorable progress report to DCYF and recommended unsupervised visitations, but the Department did not inform the Family Court about that report. On April 27, after learning that DCYF caseworkers had not disclosed the favorable report, the Family Court ordered the Department to reassign the case to a new social worker and unit. It also granted

(Continued on following page)

referred Irving and Dawn to the Early Intervention Program – a program aimed at addressing developmental delays that had been diagnosed in Kayla. *Id.* at 4a-5a. The state also referred Irving and Dawn to a Visiting Nurses Association program (to help deal with Kayla's asthma), and to the Partners in Permanency program of Children's Friend and Service, Inc. *Id.* at 5a. Although the Partners in Permanency caseworker testified that "forty-two percent of the families she worked with were cognitively limited," the program's services were not tailored to the particular needs of parents with disabilities. *Id.* at 29a. "It is undisputed that Dawn and Irving substantially complied with each referral," *id.* at 5a; *accord id.* at 34a, though their caseworkers expressed continuing concerns about conflicts with other tenants in Irving and Dawn's building, *id.* at 29a-30a, and various parenting issues.[2]

In May 2001, the Family Court granted Irving and Dawn two unsupervised in-home visits with Kayla per week; one for two hours during the day, and one overnight. *Id.* at 34a. Because of the caseworkers' concerns about conflicts with other tenants in Irving and Dawn's building, the overnight visits were moved to Sandra's house in August, where they continued until the Family Court's decision in this case. *Id.* at 34a, 51a. By November 2001, the relatives under her full-time care had passed away,

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Irving and Dawn two unsupervised in-home visits with Kayla each week. App., *infra*, at 4a n.4, 26a-27a.

[2] *See* App., *infra*, at 29a (on one occasion, "the parents argued in front of the child" over whether Kayla should have gone to a Dunkin Donuts); *id.* at 34a (Irving and Dawn "would dump a whole bag of toys out onto the floor, then just sit and watch" Kayla); *id.* at 39a ("Father did a better job of playing with Kayla than did mother, who would leave frequently to visit neighbors or make telephone calls.").

and Sandra proposed to take placement of Kayla. *Id.* at 5a n.5, 44a. Irving moved for that change of placement, but DCYF advised the Family Court that, despite having failed since January to make any accommodations for Irving and Dawn's disabilities, it would seek termination of their parental rights. *Id.* at 5a.

2. DCYF filed its termination petition in the Family Court on January 10, 2002. *Id.* Irving, Dawn, and Sandra then filed petitions for an open consent adoption, in which Sandra would adopt Kayla. *Id.* at 6a. After some procedural wrangling, the Family Court heard the termination and adoption petitions together. *Id.*

The state presented the testimony of, among others, its caseworkers and of Dr. Steven Hirsh. *Id.* at 31a. Dr. Hirsh, a clinical psychologist, had spent just over two hours evaluating Irving and Dawn, and he had never observed them with Kayla. *Id.* at 31a, 33a. He "recommended that the parents' rights be terminated and felt that future psychological social services were not recommended." *Id.* at 32a. As the transcript of 22 July 2002 reveals (at page 17), his conclusion rested significantly on his generalized belief "that individuals who have those two types of difficulties ["mild mental retardation and moderate personality disorder"] frequently have significant difficulty parenting their children."

Irving, Dawn, and Sandra all testified in support of the adoption petition. *Id.* at 42a-46a. Each of them characterized the adoption as a form of accommodation for Irving and Dawn's disabilities that would permit them to continue to see Kayla while assuring that she would be well cared for. *Id.* at 42a (Irving testified that he felt that he and Dawn could not take care of Kayla alone and that he

moved for the adoption by Sandra so that he could still see his daughter); *id.* at 42a-43a (Dawn testified that she and Irving could not take care of Kayla without help); *id.* at 43a (Sandra testified that "it was in Kayla's best interest to be with her because of her brother's limitations" and that she would permit Irving to see Kayla).

3. On January 22, 2003, the Family Court granted the state's petition for termination of parental rights and denied the petition for adoption. *Id.* at 7a. Irving and Dawn had argued both that the state had not made "reasonable efforts . . . prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family," as required by state law before termination of parental rights, R.I. Gen. L. § 15-7-7(b)(1), and that the Americans with Disabilities Act required the state to undertake "special efforts" tailored to their disabilities. App., *infra*, at 40a. But the Family Court concluded that the state had made the "reasonable efforts" required by state law and that the ADA "is not applicable in cases such as the present case." *Id.*

4. The Rhode Island Supreme Court affirmed. In a brief discussion, the court agreed with "the result reached in cases from several other jurisdictions that have held that a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." *Id.* at 11a (citing *In re Anthony P.*, 101 Cal.Rptr.2d 423 (Cal. App. 2000); *In re Antony B.*, 735 A.2d 893 (Conn. App. 1999); and *In the Interest of Torrance P.*, 522 N.W.2d 243 (Wis. App. 1994)). Because termination of parental rights proceedings "are held for the benefit of the child, not the parent," the court concluded that "the ADA is inapplicable

when used as a defense by the parent(s)." *Id.* (internal quotation marks omitted) (quoting *M.C. v. Department of Children & Families*, 750 So.2d 705, 706 (Fla. App. 2000)).

REASONS FOR GRANTING THE PETITION

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" is a state or local government or any of its departments, agencies, or instrumentalities. *Id.* § 12131(1). By its plain and unqualified terms, Title II therefore covers *any* services, programs, or activities of a state entity and reaches *any* disability-based discrimination by such an entity. The statute makes no exception for activities that implicate particularly strong state interests or that the state wishes to insulate from a prohibition on disability discrimination. This Court made that point clear in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which rejected the argument that Title II should be read as exempting prisons from its apparently unqualified coverage.

But despite the plain statutory text and this Court's decision in *Yeskey*, the Rhode Island Supreme Court here – joining appellate courts in at least 15 states – held that the ADA's nondiscrimination protections simply do not apply to state-initiated termination of parental rights proceedings adjudicated by state courts. Because that manifest misreading of the statute implicates a persistent confusion among state courts, and affects interests that

this Court has repeatedly recognized as being of the highest importance, this Court's intervention is necessary.

A. The Decision Of The Rhode Island Supreme Court Conflicts With The ADA's Plain Terms And This Court's Decision In *Yeskey*

In both the Family Court and the Rhode Island Supreme Court, Petitioners argued that termination of their parental rights would violate the ADA for several reasons, including: (1) the state failed to provide reunification services that were tailored to Irving and Dawn N.'s disabilities and thus violated the requirement that it make "reasonable modifications" where necessary to avoid discrimination, *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 592 (1999); pp. 3-4, *supra*; (2) Dr. Hirsh's key testimony in support of the decision to terminate rested on stereotypes about the parenting skills of people with mental retardation rather than on a truly individualized assessment of Irving and Dawn's abilities (*see* p. 5, *supra*); and (3) the state court failed to consider whether permitting Sandra N. to adopt Kayla would be a proper "reasonable modification," *see* pp. 5-6, *supra*.

The state courts refused to consider these arguments; they held, instead, that the ADA simply does not apply to termination of parental rights proceedings. The Rhode Island Supreme Court declared that "a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." App., *infra*, at 11a. But the court did not discuss any definitions of the terms "services, programs, or activities" in making that ruling, nor did it address this Court's interpretation of those terms in *Yeskey*. Instead, the Rhode Island Supreme Court simply

asserted that because termination of parental rights proceedings "are held for the benefit of the child, not the parent . . . the ADA is inapplicable when used as a defense by the parent(s)." *Id.*

1. The Rhode Island Supreme Court's conclusion disregards the plain text of the ADA. Termination of parental rights proceedings are "activities" of a public entity (here, the State of Rhode Island) under the plain meaning of the term. As Judge Boggs has explained, "the word 'activities,' on its face, suggests great breadth and offers little basis to exclude *any* actions of a public entity." *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (emphasis added); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) ("the plain meaning of 'activity' is a 'natural or normal function or operation,'" and thus the ADA encompasses any "normal function of a governmental entity") (citation omitted), *overruled in part on other grounds*, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). Both lay and legal dictionaries support that reading. *See Webster's Third New International Dictionary* 22 (1961) (defining "activity" as the "function or duties" of "an organizational unit for performing a specific function" and as an entity's "natural or normal function or operation – on the stock exchange'"); *Black's Law Dictionary* (8th ed. 2004) (defining "activity" as "[t]he collective acts of one person or of two or more people engaged in a common enterprise"). Termination of parental rights proceedings, which are normal functions or operations of state courts and child welfare agencies, are plainly "activities" under these definitions – regardless of whom they are designed to protect. If the contrary were true, the judicial proceedings to which this Court applied Title II in *Tennessee v. Lane*,

541 U.S. 509 (2004), would not have been covered by the statute.

Moreover, in seeking family reunification efforts tailored to their disabilities, Petitioners also plainly requested reasonable modifications to state "services" and "programs." Indeed, the Rhode Island termination of parental rights statute itself refers to such reunification efforts as "*services* to correct the situation which led to the child being placed [in state custody]." R.I. Gen. Law § 15-7-7(a)(3) (emphasis added). And the Rhode Island Supreme Court's own opinion repeatedly referred to the reunification efforts provided by the state and sought by Petitioners as "services" (18 times) and "programs" (9 times). App., *infra*, at 2a-14a. In *Yeskey*, 524 U.S. at 210, this Court held that the ADA applied to a request to participate in a prison boot camp that a state statute explicitly referred to as a "program." The Rhode Island Supreme Court should have reached the same conclusion here.

In any event, Title II's plain text extends beyond exclusion from "services, programs, and activities" to reach (in the second clause of the operative provision) *any* disability-based discrimination by a public entity. *See* 42 U.S.C. § 12132 ("[n]o otherwise qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any [public] entity"). The Rhode Island Supreme Court completely ignored that statutory prohibition.[3]

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[3] The Department of Justice, which is charged with issuing regulations to implement the ADA, *see* 42 U.S.C. § 12134, has confirmed that "title II applies to anything a public entity does." 28 C.F.R. Pt. 35, App. A. And Section 504 of the Rehabilitation Act of 1973, which the ADA specifically incorporates, *see* 42 U.S.C. 12201(a); *Bragdon v.*

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2. The decision of the Rhode Island Supreme Court cannot be squared with *Yeskey*. There, Pennsylvania argued that Title II should be construed not to reach state prisons, because applying the ADA in that context would override the state's ability to structure its activities in an area in which it had important interests. *See Yeskey*, 524 U.S. at 208-209. But this Court rejected that argument and held that Title II's unqualified coverage of any service, program, or activity of a public entity "unmistakably includes state prisons": The broad statutory text "plainly covers state institutions, without any exception that could cast the coverage of prisons into doubt." *Id.* at 209. To the argument that Congress never expected the ADA to apply to prisons, this Court responded: "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* at 212 (internal quotation marks omitted).

In reading the ADA as not applying to state termination of parental rights proceedings, the Rhode Island Supreme Court relied on exactly the sort of argument this Court rejected in *Yeskey*. Because the state treats termination proceedings as being "held for the benefit of the child, not the parent," the Rhode Island Supreme Court believed it inappropriate to protect the parents' rights against discrimination in those proceedings. App., *infra*, at 11a. But Title II simply contains no "exception that could cast the coverage of [parental-rights termination proceedings]

Abbott, 524 U.S. 624, 632 (1998), also confirms the point. Like Title II, Section 504 applies to "program[s] or activit[ies]," 29 U.S.C. § 794(a), and it defines "program or activity" to embrace "*all* of the operations of" a "department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id.* § 794(b)(1)(A) (emphasis added).

into doubt." *Yeskey*, 524 U.S. 209. Regardless of the state interests the Rhode Island Supreme Court believed to be served by denying parents protection against disability-based discrimination in proceedings to terminate their parental rights, the ADA's broad text plainly reaches those proceedings.[4] Both the plain statutory text and this Court's decision in *Yeskey* foreclose any argument that Title II applies only to state activities that occur for the benefit of the disabled plaintiff.

B. This Case Involves A Recurring Issue That Has Confused The Lower Courts

Even if the lower courts were uniform in construing the ADA not to apply to termination proceedings, the plain conflict between that construction and the statutory text would warrant certiorari. *See Lexcon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (granting certiorari to consider a question on which lower courts were unanimous when those decisions conflicted with the plain text of a federal statute). But the state courts have in fact taken a variety of different positions regarding whether and how Title II of the ADA applies to

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[4] In any event, the application of the ADA to termination of parental rights proceedings was hardly beyond Congress's contemplation. *See, e.g.*, H.R. Rep. No. 101-485, Part 3 at 25 (1990) (House Judiciary Committee Report on the ADA observing that "discriminatory policies and practices affect people with disabilities in every aspect of their lives," including "securing custody of their children"). Nor is it a novel proposition that federal law can protect parents against discrimination in state proceedings that aim to protect their children. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (recognizing that child custody proceedings aim to protect the child, but holding that the Fourteenth Amendment protects parents from racial discrimination in those proceedings).

termination of parental rights proceedings. That disagreement makes it all the more urgent that this Court step in.

1. In the sixteen years since the ADA's enactment, state appellate courts have issued scores of decisions addressing Title II's application to termination of parental rights proceedings. Although we have found no reported decision holding that a state violated a parent's ADA rights in a termination proceeding, that seeming unanimity obscures a deeper confusion among the state courts on whether and how the ADA applies to those proceedings.

Rhode Island is one of 16 states in which the courts have refused to permit parents with disabilities to assert, as grounds opposing termination of their parental rights, that termination would violate their rights under the ADA. Courts in seven of those states (including the Rhode Island Supreme Court) have held that termination of parental rights proceedings are not "services, programs, or activities of a public entity" that implicate the ADA.[5]

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[5] *See In re La'Asia Lanae S.*, 803 N.Y.S.2d 568, 569 (N.Y. App. Div. 2005) (ADA "has no bearing on" termination of parental rights proceeding); *In re Chance Jahmel B.*, 723 N.Y.S.2d 634, 632 (N.Y. Fam. 2001) ("Termination of parental rights proceedings do not appear to be 'services, programs, or activities' such that the ADA would apply here"); *In re Anthony P.*, 101 Cal.Rptr.2d 423, 425-426 (Cal. App. 2000) (termination of parental rights proceedings are not "services, programs, or activities" for purposes of ADA); *In re Antony B.*, 735 A.2d 893, 899 (Conn. App. 1999) ("a termination proceeding is not a 'service, program or activity' under the ADA"); *Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001) ("proceedings to terminate parental rights do not constitute 'services, programs, or activities' for the purposes of 42 U.S.C. § 12132, and therefore, the ADA is not a defense to such proceedings"); *State ex rel. B.K.F.*, 704 So.2d 314, 317 (La. App. 1997) ("termination of parental rights proceedings are not 'services, programs or activities' within the meaning of the ADA"); *In re B.S.*, 693 A.2d 716, 720-721 (Vt.

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Courts in eleven of those states have specifically held, also consistent with the Rhode Island Supreme Court, that the ADA cannot be asserted as a defense in termination proceedings.[6] Courts in some of these states (though, notably, *not* the Rhode Island Supreme Court) have acknowledged that the ADA applies to the reunification services states provide prior to termination, but they have

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1997). *See also Arneson v. Arneson*, 670 N.W.2d 904, 911 (S.D. 2003) ("A custody proceeding is not a 'service, program, or activity' under the provisions of the ADA").

[6] *See In re Brendan C.*, 874 A.2d 826, 836 (Conn. App. 2005) ("Connecticut does not recognize the ADA as providing a defense or creating special obligations in a termination proceeding."); *In re E.T.C.*, 141 S.W.3d 39, 48 (Mo. App. 2004) (ADA provides no defense to termination proceeding); *In re S.G.S.*, 130 S.W.3d 223, 230 (Tex. App. 2004) (declining "to create an affirmative defense out of noncompliance with the ADA"); *In re Doe*, 60 P.3d 285, 291-93 (Haw. 2002) (ADA does not provide a defense to termination proceedings); *In re Kassandra T.*, 2001 WL 1243364 at *3 (Wis. App. 2001) ("an alleged violation of the ADA is not a basis for challenging a TPR proceeding"); *Adoption of Gregory*, 747 N.E.2d at 125 ("ADA is not a defense to such proceedings"); *M.C. v. Dept. of Children and Families*, 750 So.2d 705, 706 (Fla. App. 2000) ("the ADA is inapplicable when used as a defense by the parent(s)," because "dependency proceedings are held for the benefit of the child, not the parent"); *In re Diamond H.*, 98 Cal.Rptr.2d 715, 722 (Cal. App. 2000) (ADA "does not directly apply to juvenile dependency proceedings and cannot be used as a defense in them"), *overruled on other grounds*, *Renee J. v. Superior Court*, 110 Cal.Rptr.2d 828, 838 & n.6 (Cal. 2001) (ADA "does not directly apply to juvenile dependency proceedings and cannot be used as a defense in them"); *In re Harmon*, 2000 WL 1424822 at *12 (Ohio App. 2000) ("a failure to comply with the ADA" does not serve "as a basis for invalidating an award of permanent custody"); *People ex rel. T.B.*, 12 P.3d 1221, 1223 (Colo. App. 2000) ("the ADA cannot be raised as a defense to a termination of parental rights proceeding"); *In re A.P.*, 728 A.2d 375, 379 (Pa. Super. 1999) (ADA inquiry "untenable" in "the context of a disposition review proceeding"); *In re Torrance P.*, 522 N.W.2d 243, 246 (Wis. App. 1994) (ADA violation "is not a basis to attack the TPR order").

said that parents must enforce their rights by filing separate lawsuits.[7]

In other states, however, the courts have permitted parents to oppose termination on the ground that it would violate the ADA. The Iowa and Washington courts have treated violation of the ADA as a defense to termination proceedings, but they have not, to our knowledge, yet found any actual violations of the ADA in this context.[8]

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[7] *See Chance Jahmel B.*, 723 N.Y.S.2d at 640 ("a failure of the government to offer a disabled parent access to remedial services available to non-disabled parents" might "in a proper case provide a separate and independent claim under the ADA"); *Doe*, 60 P.3d at 291 ("any purported violation may be remedied only in a separate proceeding brought under the provisions of the ADA"); *Adoption of Gregory*, 747 N.E.2d at 126-127 (state must comply with the ADA "in its provision of services *prior* to" termination, and parents can challenge violation of that duty at the time they receive those services or in "a separate action for discrimination under the ADA"); *Anthony P.*, 101 Cal.Rptr.2d at 425-426 ("parent may have a separate cause of action under the ADA") (internal quotation omitted); *Antony B.*, 735 A.2d at 899 n.9 (failure to provide appropriate reunification services "would give rise to a separate cause of action under the ADA"); *Diamond H.*, 98 Cal.Rptr.2d at 722 (the ADA does not "provide a separate basis for challenging the actions of the court or Agency," and any challenge "must be raised in a separate cause of action in federal court"); *Harmon*, 2000 WL 1424822 at *12 ("the ADA appears to contemplate a separate procedure for its enforcement"); *A.P.*, 728 A.2d at 379 ("Mother may have a separate cause of action against CYS pursuant to the ADA"); *B.S.*, 693 A.2d at 722 (mother could sue the state "if SRS [Social and Rehabilitative Services] has violated the ADA"); *Torrance P.*, 522 N.W.2d at 246 (parent "may have a separate cause of action under the ADA based on the County's actions or inactions"). *See also In re E.E.*, 736 N.E.2d 791, 796 (Ind. App. 2000) (ADA does not apply to termination of parental rights proceedings in Indiana, because "the provision of family reunification services is not a requisite element of our parental rights termination statute").

[8] *See In re C.M.*, 2004 WL 1900100 at *2 (Iowa App. 2004) (the "ADA requires a public entity to make 'reasonable accommodation' to allow a disabled person to participate in services," but finding that the

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The Alaska Supreme Court has suggested that an ADA violation would preclude a showing of "reasonable efforts" at reunification, a showing state law requires before termination. *J.H. v. State Dep't of Health & Social Services*, 30 P.3d 79, 86 n.11 (Alaska 2001).[9] And Arkansas, by statute, requires state compliance with the ADA in at least

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reunification services provided to the mother were reasonable); *In re K.K.*, 2004 WL 574685 at *1 (Iowa App. 2004) (same); *In re J.A.*, 2003 WL 22203471 at *1 (Iowa App. 2003) (same); *In re S.S.*, 2002 WL 31425426 at *2 (Iowa App. 2002) (same); *In re M.J.M.*, 2002 WL 987437 at *1-2 (Iowa App. 2002) (same). *See also In re M.C.*, 2002 WL 1758359 at *2 (Iowa App. 2002) ("We conclude the juvenile court was correct in concluding the ADA mandates were met with regard to the mother"); *In re Welfare of Angelo H.*, 102 P.3d 822, 826 (Wash. App. 2004) (recognizing, in termination of parental rights proceeding, that "the ADA requires public entities to make reasonable accommodation for disabled persons" but finding no violation because the statute "does not require DSHS to provide disabled parents with services not offered to other parents"); *In re Welfare of H.S.*, 973 P.2d 474, 481 (Wash. App. 1999) (although the ADA "requires public entities to make reasonable accommodation for disabled persons," the statute "does not require public entities to provide the disabled with services not offered to others"); *In re Welfare of A.J.R.*, 896 P.2d 1298, 1302 (Wash. App. 1995) (finding that the state provided "reasonable accommodation" of disabilities); *In re Dependency of C.C.*, 1999 WL 106824 at *5 (Wash. App. 1999) (same); *In re Welfare of Joshua R.*, 1998 WL 465203 at *5 (Wash. App. 1998) (same); *In re Dependency of C.P.*, 2002 WL 49922 at *7 (Wash. App. 2002) (finding no ADA violation and therefore declining to decide whether ADA provides defense to termination proceeding).

[9] A Michigan case illustrates the intense confusion that has gripped the lower courts on this issue. Although the court held "that termination of parental rights proceedings do not constitute 'services, programs or activities,'" and "that a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings," it turned around to hold, in almost the same breath, that if the state's provision of reunification services violates the ADA, a court cannot make the required finding "that reasonable efforts were made to reunite the family." *In re Terry*, 610 N.W.2d 563, 570 (Mich. App. 2000).

some termination proceedings. Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(b).

This confusion in the state courts has real consequences for parents with disabilities. If Irving and Dawn N. had lived in Iowa or Washington (or perhaps Alaska), their ADA claim would have been considered on the merits. Because they live in Rhode Island, however, the state courts terminated their parental rights without even considering whether that action violated their rights under the ADA.

Congress enacted the ADA as a "clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). This Court's intervention is necessary to assure that the implementation of that national mandate does not vary based on the state in which an individual with a disability resides.

2. The Rhode Island Supreme Court's decision also implicates a broader disagreement in the lower courts about the coverage of Title II of the ADA. At least six federal circuits have held that Title II's broad operative language reaches "anything a public entity does." *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998). *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999); *Johnson*, 151 F.3d at 569-570; *Bledsoe v. Palm Beach Soil & Water Conservation Dist.*, 133 F.3d 816, 821-822 (11th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Innovative Health*, 117 F.3d at

44-45. *See also Gorman v. Bartch*, 152 F.3d 907, 913 (8th Cir. 1998) (Title II reaches "the ordinary operations of a public entity").[10]

In *Thompson v. Davis*, 295 F.3d 890, 896-99 (9th Cir. 2002), *cert. denied*, 538 U.S. 921 (2003), the court applied that principle to a context very much like the one here. There, the court of appeals held that Title II applies to parole proceedings and that parole determinations therefore must comply with the statute's requirements of nondiscrimination and reasonable modification. *See id.* Although parole proceedings exist to protect the public (just as parental-rights termination proceedings exist, according to the Rhode Island Supreme Court, to protect children), the court held that the ADA prohibited the state from relying on stereotypes or blanket exclusions to deny parole to otherwise qualified prisoners with disabilities. *Id.* at 898 & n.4.

By holding that Title II does *not* reach one of the ordinary activities of state government – that termination of parental rights proceedings are not "services, programs, or activities of a public entity" – the Rhode Island Supreme Court and courts in at least six other states have taken positions in conflict with these federal circuit courts.

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[10] A panel of the Ninth Circuit seemed to reject the argument that Title II applies to anything a public entity does, reading the statute to apply to all "outputs" of a public entity (as opposed to " 'inputs' such as employment"). *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 531 U.S. 1189 (2001). Later decisions confirm that the Ninth Circuit applies Title II at least to all "outputs" of public entities. *See Barden*, 292 F.3d at 1076; *Hason v. Medical Bd.*, 279 F.3d 1167, 1172 (9th Cir. 2002) (ADA applies to medical licensing as an "output" of the state medical board), *cert. dismissed*, 538 U.S. 958 (2003).

The conflict with the Ninth Circuit's decision in *Thompson* is particularly direct. This Court's intervention is necessary to resolve this basic disagreement about the ADA's reach.

C. The Question Presented Is Exceptionally Important

The question here, like the one on which this Court granted certiorari in *Olmstead*, 527 U.S. at 596, is exceptionally important "to the States and affected individuals." In 1999, the National Institute on Disability and Rehabilitation Research estimated that at least 6.9 million Americans with disabilities between the ages of 18 and 64 are custodial parents. *See* Lita Jans & Susan Stoddard, CHARTBOOK ON WOMEN AND DISABILITY IN THE UNITED STATES 31 (1999). This Court's intervention is vital to assure those parents that the ADA's "clear, strong, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), constrain state efforts to strip their parental rights.

Indeed, this Court has repeatedly recognized that a "parent's interest in the accuracy and justice of the decision to terminate his or her parental status" is "a commanding one." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). A "parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982) (internal quotation marks omitted). Through a termination of parental rights proceeding, a state "is seeking to destroy permanently all legal recognition of the parental relationship." *Rivera v. Minnich*, 483 U.S. 574, 580 (1987). "Few forms of state action are both so severe

and so irreversible." *Santosky*, 455 U.S. at 759. Petitioners – and all parents with disabilities who must defend against termination of parental rights proceedings – have a fierce interest in assuring that "the State's devastatingly adverse action," *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1997), conforms with federal law. *See also id.* at 129 (Kennedy, J., concurring in the judgment) (noting parent's "fundamental interests . . . in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law").

Despite this commanding interest, parents with disabilities suffer widespread, unjustified discrimination in termination proceedings. Discrimination touches parents with intellectual disabilities (like Petitioners),[11] psychiatric disabilities,[12] and even physical and sensory disabilities.[13] Discrimination occurs directly in judicial

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[11] *See* Martha A. Field & Valerie A. Sanchez, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 5, 273 (1999) ("Often state authorities move to terminate the parental rights of persons with mental retardation because of generalized fears that retardation makes for parental inadequacy. Often their rights actually are terminated, even though the parents' conduct would have seemed acceptable to state authorities had the parents not been considered 'mentally retarded.' . . . [A]ny broad selection of opinions suggests that judges are peculiarly unacquainted with and unsympathetic to the problems of persons with mental retardation and are particularly fearful of allowing them to parent.").

[12] *See* Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIVIL RIGHTS. L. REV. 273, 291-299 (2003).

[13] *See* Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities*, 60 BROOK. L. REV. 1069, 1083 (1994) (judicial bias "often manifests itself in different guises for different disabilities: deaf parents are thought to be incapable of effectively stimulating language skills; blind parents cannot provide adequate attention or discipline; and parents with

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determinations of parental fitness, and in the failure to make reasonable accommodations in family reunification services that must be provided before termination.[14] Indeed, a recent federal review lists statutes in 30 states that make "mental deficiency," "mental illness," or similar disabilities a factor in termination decisions. *See* National Adoption Information Clearinghouse, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SUMMARY OF STATE LAWS (2005).[15] These statutes are often "interpreted such that the mere label of mental disability constitutes grounds for parental rights termination." Kerr, *supra*, at 403. Parents with disabilities in the many states where these statutes are in force have an especially strong interest in ensuring that courts make the individualized determination of qualification that the ADA demands – rather than broadly disqualifying all parents with a given disability – before terminating their parental rights.

Irving and Dawn N. have a powerful interest in the question presented as well. Their ADA claims were hardly frivolous. *See* p. 8, *supra*. But the Rhode Island courts refused even to consider those claims. This Court's

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spinal cord injuries cannot adequately supervise their children") (footnotes omitted).

[14] *See* Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 403-420 (2000).

[15] The states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Statutes in Georgia, Kansas, Mississippi, Ohio, and South Carolina make physical disability a factor as well.

intervention is necessary to ensure that Irving and Dawn N. are protected against the violation of their ADA rights in the proceedings in which the state seeks "to sever permanently [their] parent-child bond." *M.L.B.*, 519 U.S. at 116.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 30, 2006

APPENDIX A

Supreme Court Appeal.

No. 2003-400-(98-336-2)

In re KAYLA N. :

Present: Williams, C.J., Goldberg, Flaherty, Suttell, and Robinson, JJ.

OPINION

(Filed June 30, 2006)

Introduction

Justice Robinson for the Court. This is an appeal from a Family Court judgment terminating the parental rights of the respondents Dawn and Irving N. with respect to their child, Kayla N., and denying a petition for an open adoption of the child by the respondent Sandra N., who is the child's paternal aunt. For the reasons set forth herein, we affirm the judgment of the Family Court.

Facts and Travel

The involvement of Dawn and Irving N. with the Department of Children, Youth and Families (DCYF) began even before the birth of their daughter, Kayla. Both parents are cognitively limited and have been diagnosed as being mildly mentally retarded. Prior to her marriage to Irving, Dawn had had another child, Michelle, with another man; but Dawn was unable to care for Michelle because, in addition to her cognitive and other limitations, she moved from place to place and was homeless at one

point.[1] After DCYF filed a petition for involuntary termination of parental rights with respect to Michelle, Dawn agreed to an open adoption of that child by the foster family with whom Michelle had been living.

Prior to Kayla's birth, DCYF had determined that it would be unsafe for the baby to be placed at home with Dawn and Irving due to (1) Dawn's inability to care for her first child; and (2) DCYF's concerns about threats to the child and to Irving that had been made by Dawn's mother. Approximately one month before Kayla's birth, DCYF had inquired as to whether there were any biological relatives with whom Kayla could be placed, and Irving had suggested both his niece, Cheryl L., and his sister, Sandra N. However, DCYF deemed Cheryl L. to be an unsuitable candidate because she herself had an open case with the agency at that time. The second suggested biological relative, Sandra N., was unable at that time to take on the full-time responsibility which placement of Kayla with her would entail, because she was caring for two other relatives, each of whom was terminally ill.

Consequently, after Kayla was born on April 13, 2000, she was placed in non-relative foster care with the foster parents (who later became the adoptive parents) of her half-sister, Michelle. Kayla has remained with that foster family ever since.

DCYF developed several case plans for Dawn and Irving, the goal of each of which was the reunification of Kayla with her parents. As part of those case plans, DCYF also provided certain services to the parents, including a

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[1] Kayla is Irving's only child.

referral to a parent-aide program conducted by an entity known as Spurwink of Rhode Island (Spurwink). That program is tailored to assist parents and/or children with cognitive limitations or developmental delays. As part of the services offered by Spurwink, which services began when Kayla was born, Dawn and Irving visited with Kayla once a week at a DCYF office, under the supervision of a Spurwink case aide.

In October of 2000, Dawn and Irving began to request that their visits with Kayla take place in their home. On December 1, 2000, both parents admitted to dependency due to their cognitive limitations. Their admissions of dependency were conditioned, however, upon DCYF's arranging supervised in-home visits between Kayla and them. The Family Court ordered that DCYF provide such visits by January 26, 2001. Spurwink refused to supervise the court-ordered in-home visits between Kayla and her parents, stating in the discharge summary that its refusal was prompted by "safety issues and concerns."[2] Because Spurwink was unwilling to supervise in-home visits, the last Spurwink-supervised visit took place at a DCYF office on December 29, 2000.[3]

Earlier in December, Spurwink had informed DCYF that funding for its services was running out, and it requested that DCYF renew the necessary funding so that

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[2] The "safety issues and concerns" mentioned in the Spurwink discharge summary, dated January 10, 2001, appear to revolve around a purported threat made by Dawn in a telephone message to a Spurwink employee, in connection with an ongoing conflict involving Dawn's mother.

[3] Because no home visits had been arranged for Dawn and Irving, their admissions of dependency were vacated on January 26, 2001.

it could continue to provide parent education services to Dawn and Irving. Spurwink reiterated its request for the renewal of funding twice more in January of 2001. However, DCYF opted not to renew funding for Spurwink's services on the ground that Spurwink had refused to supervise in-home visits. Because the funding was not renewed, Spurwink's parent education services terminated in January of 2001.

Following the cessation of Spurwink's services, DCYF referred Dawn and Irving to several other programs. In February of 2001, weekly parent-aide services were provided to Dawn and Irving by the John Hope Settlement House; those services included in-home visits for two hours once per week.[4] Funding for the services of the John Hope Settlement House unfortunately ran out in March of 2001, and DCYF did not renew that funding. Consequently, those services terminated on March 22, 2001. In March of 2001, DCYF made a referral to the Child Development Center at Rhode Island Hospital in order to obtain services to address the special needs of Dawn and Irving. The Child Development Center also later diagnosed Kayla as having global developmental delays.

In April of 2001, the Family Court ordered that Dawn and Irving be provided two unsupervised in-home visits per week with Kayla. In addition to arranging those visits, DCYF referred Dawn and Irving to the Early Intervention

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[4] In March of 2001, a supervisor at the John Hope Settlement House sent a favorable progress report to DCYF with respect to Dawn and Irving. On April 11, 2001, counsel for Irving filed a motion seeking reassignment of a DCYF caseworker, who Irving alleged had failed to disclose that report to the Court. The Family Court granted that motion on April 26, 2001.

Program at the Meeting Street Center, and those services began in May of 2001. DCYF also referred Dawn and Irving to the Healthy Tomorrows Program of the Kent County VNA and to a parent-aide program of Children's Friend and Service, Inc., called Partners in Permanency. Dawn and Irving were also referred for various evaluations and for individual counseling. It is undisputed that Dawn and Irving substantially complied with each referral.

In August of 2001, Irving's sister, Sandra, began hosting overnight visits with Kayla at her home once a week; and Dawn and Irving visited Kayla during those overnight visits at Sandra's home.[5] Dawn and Irving were also counseled in their own home by a parent aide from the Partners in Permanency program, and Kayla was occasionally present at those meetings as well.

On January 4, 2002, Irving filed a motion seeking to have Kayla placed with his sister, Sandra. On January 10, 2002, DCYF filed a petition to terminate the parental rights of both Dawn and Irving alleging, in reliance upon G.L.1956 § 15-7-7(a)(2)(vii), that Dawn and Irving were unfit to parent Kayla on the ground that they "exhibited behavior or conduct that is seriously detrimental to the child, of such a duration as to render it improbable for the parents to care for the child for an extended period of time." DCYF's petition also alleged, in reliance upon § 15-7-7(a)(3), that Kayla had been in the legal custody or care of DCYF for a period of at least twelve months; that Dawn

[5] By the end of November of 2001, Sandra's other niece and her brother, for both of whom she had been caring on a full-time basis, had died. Sandra then discussed with Irving the possibility of seeking placement of Kayla with her.

and Irving had been offered and had received services to correct the situation and that there was not a substantial probability that Kayla would be able to return to their care within a reasonable period of time considering her age and need for a permanent home.

On February 21, 2002, Irving filed a motion seeking to have Kayla permanently placed with his sister, Sandra, in contemplation of a "direct consent adoption" of Kayla by Sandra. On February 24, 2002, Dawn filed a motion seeking the same placement for Kayla; her motion incorporated Irving's motion by reference. On April 5, 2002, Sandra filed a petition for adoption, to which Dawn and Irving consented, which was accompanied by an open adoption decree form. Initially, a justice of the Family Court ordered that the adoption petition be heard prior to any hearing on DCYF's petition for termination of parental rights, but he thereafter indicated that he would not give precedence to the hearing on the adoption petition. Dawn, Irving, and Sandra then filed a joint petition with this Court seeking issuance of a writ of certiorari. We granted that petition on May 23, 2002. In the order granting the petition for writ of certiorari, we ordered that "[t]he hearing on the direct consent adoption petition * * * be consolidated with the termination of parental rights hearing."

After the remand by this Court, the consolidated hearing in Family Court began on May 24, 2002. It was a protracted hearing, and it continued on various dates until December 6, 2002. The hearing justice ruled that the hearing on DCYF's petition for termination of parental rights would proceed first; and, immediately after conducting that hearing, he heard testimony with respect to the petition for a direct consent adoption that had been filed

by Sandra and consented to by Dawn and Irving. At the conclusion of the consolidated hearing, the Family Court justice issued a forty-two-page decision, in which he reviewed in some detail the testimony of the witnesses (which testimony is recorded in fourteen volumes of transcript). He also expressed concern about the number of innocent parties involved in the case and about the emotionally heartbreaking aspects of the case.

The hearing justice ultimately found that DCYF had shown, by clear and convincing evidence, that Dawn and Irving were unfit to parent Kayla. He further found that there was no probability that Kayla could safely be returned to their care within any reasonable time. The hearing justice also concluded, after considering the totality of the evidence, that DCYF had made reasonable efforts to reunify Kayla with her parents. After finding that Dawn and Irving were unfit to parent Kayla, the hearing justice also found that terminating their parental rights was in Kayla's best interests.

In addition, the hearing justice denied the petition for adoption that had been filed by Sandra and consented to by Dawn and Irving. In so doing, he found that the adoption petition would never have been filed had DCYF not petitioned for the termination of Dawn and Irving's parental rights. He determined that Dawn and Irving consented to the adoption petition because they felt that it was their only chance to maintain contact with Kayla. In addition, the hearing justice placed considerable weight on (1) the fact that Kayla and her half-sister, Michelle, had been raised in the same home since Kayla's birth and (2) the fact that the two young girls had closely bonded with each other during that time.

Dawn filed a notice of appeal on February 20, 2003. Irving and Sandra each filed a notice of appeal on March 26, 2003.[6] The appeal was docketed in this Court on July 18, 2003. Visitation between Kayla and her parents has continued during the pendency of this appeal.

On appeal, respondents contend that the hearing justice made numerous errors in his findings of fact which formed the basis for his decision to terminate Dawn and Irving's parental rights.[7] Specifically, respondents contend that the hearing justice erred in finding (1) that DCYF made reasonable efforts towards reunification; (2) that Dawn and Irving were unfit under § 15-7-7(a)(2)(vii) and § 15-7-7(a)(3);[8] and (3) that it was in Kayla's best interests

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[6] These notices of appeal were all filed prior to the actual entry of the judgment on April 28, 2003. However, this Court has routinely treated prematurely filed notices of appeal as if they were timely. *See, e.g., McBurney v. The GM Card,* 869 A.2d 586, 589 n. 3 (R.I. 2005); *Dovenmuehle Mortgage, Inc. v. Antonelli,* 790 A.2d 1113, 1114 n. 1 (R.I. 2002).

[7] Irving and Sandra N. are not represented on this appeal by the same counsel as represents Dawn, and the brief filed in this Court on behalf of Irving and Sandra is different from Dawn's. Nevertheless, Irving and Sandra have adopted and incorporated the arguments made by Dawn in her brief, and Dawn has likewise adopted and incorporated the arguments of Irving and Sandra.

[8] The provisions of G.L.1956 § 15-7-7 that are relevant to this appeal read as follows:

> "**Termination of Parental Rights.** – (a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:
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> "* * *

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to have the parental rights of Dawn and Irving terminated. The respondents have also adopted the argument articulated by the Rhode Island Disability Law Center, Inc., in a brief which it filed in its capacity as amicus curiae, to the effect that certain provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 through 12134, apply to proceedings to terminate parental rights.

With respect to the hearing justice's denial of the petition for adoption, respondents contend that Dawn and Irving retained the right to consent to Kayla's adoption prior to a final termination of their parental rights and that, by choosing to address DCYF's petition for termination first, the Family Court "short-circuited" their fundamental right to consent to the adoption. In addition, respondents contend that the Family Court should have deferred to their expressed preference concerning who would be a suitable adoptive parent for Kayla. They also argue that the denial of the adoption petition was contrary

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"(2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:

"* * *

"(vii) The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

"(3) The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home * * *."

to Kayla's best interests. Finally, respondents contend that Sandra is a fit and proper relative to adopt Kayla and that the amount of time that Kayla has spent with her foster family should not control the outcome of this case.

Standard of Review

This Court employs a deferential standard of review when reviewing a Family Court decision to terminate a person's parental rights. *See, e.g., In re Shawn M.*, 898 A.2d 102, 106 (R.I. 2006); *In re Mariah M.*, No. 2004-193-A., slip op. at 6 (R.I., filed Mar. 14, 2006). We examine the record to establish whether the hearing justice's findings are supported by legally competent evidence. *E.g., In re Shawn M.*, 898 A.2d at 106; *In re Mariah M.*, slip op at 6. The hearing justice's findings are entitled to great weight, and this Court will not disturb them on appeal unless he or she overlooked or misconceived material evidence or was otherwise clearly wrong. *In re Shawn M.*, 898 A.2d at 106.

Analysis

I
Termination of Parental Rights

A
The Americans with Disabilities Act

The respondents have adopted as their own the argument of the amicus, the Rhode Island Disability Law Center, Inc., to the effect that certain provisions of the Americans with Disabilities Act (the ADA), 42 U.S.C. §§ 12131 through 12134, apply to proceedings to terminate parental rights. Relying upon Title II of the ADA, which prohibits any public entity from discriminating against

qualified persons with disabilities in the provision or operation of public services, programs or activities, 42 U.S.C. §§ 12131-12134, respondents contend that DCYF is required to abide by the ADA when that agency seeks to terminate the parental rights of natural parents. The hearing justice, in his written decision, concluded that the ADA was not applicable to cases such as this one.

After considering the issue in a *de novo* manner, we are in agreement with the conclusion of the hearing justice, which is consistent with the result reached in cases from several other jurisdictions that have held that a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA.[9]

We agree with and apply to termination of parental rights proceedings in this state the following language from a Florida court with respect to that state's dependency proceedings: "[Such] proceedings are held for the benefit of the child, not the parent. Therefore, the ADA is inapplicable when used as a defense by the parent(s) in proceedings such as here under review." *M.C. v. Department of Children & Families,* 750 So.2d 705, 706 (Fla. Dist. Ct. App. 2000); *see also In the Interest of A.P.,* 728 A.2d 375, 379 (Pa. Super. Ct. 1999).

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[9] *See, e.g., In re Anthony P.,* 101 Cal.Rptr.2d 423, 425, 426 (Cal. Ct. App. 2000) (holding that a proceeding to terminate parental rights is not a governmental service, program, or activity and therefore is not preempted by Title II of the ADA); *In re Antony B.,* 735 A.2d 893, 899 (Conn. App. Ct. 1999) ("[T]he ADA neither provides a defense to nor creates special obligations in a termination proceeding."); *In the Interest of Torrance P.,* 522 N.W.2d 243, 246 (Wis. Ct. App. 1994).

Accordingly, we reject respondents' ADA-based contention.

B
DCYF's Efforts Towards Reunification

The respondents also contend on appeal that the hearing justice erred in finding that DCYF made reasonable efforts towards reunification. The respondents are correct that, pursuant to § 15-7-7(b)(1), DCYF was required to make reasonable efforts to encourage and strengthen the parental relationship so that Kayla could safely return to the family. *See In re Christopher B.*, 823 A.2d 301, 308 (R.I. 2003). Moreover, this Court has stated that "'consistent with a "totality of the circumstances" approach,' the efforts required from DCYF to satisfy the reasonable efforts standard 'vary with the differing capacities of the parents involved.'" *Id.* (quoting *In re William, Susan, and Joseph,* 448 A.2d 1250, 1256 (R.I. 1982)).

Nevertheless, we agree with the hearing justice's observation that "[t]here must be a limit to the extension of reasonable efforts." In the instant case, DCYF prepared four case plans, all of which had as their goal the reunification of Kayla and her parents. DCYF initially made a referral to Spurwink, a facility that tailored its programs to cognitively impaired persons; and, when those services were terminated, DCYF made no fewer than four other referrals to programs providing services intended to encourage and strengthen the parental relationship. In addition, the hearing justice pointed out that one of the parent aides to whom DCYF referred Dawn and Irving had had experience with persons suffering from the same medical condition as respondents.

We are unable to conclude that those various efforts aimed at reunification were inadequate. Accordingly, we affirm the hearing justice's determination that the efforts made by DCYF were not unreasonable.

C
The Hearing Justice's Finding of Unfitness

The respondents' next contention on appeal is that the hearing justice erred in finding that, pursuant to the provisions of both § 15-7-7(a)(2)(vii) and § 15-7-7(a)(3), Dawn and Irving are unfit to parent Kayla. They argue that none of the factual findings upon which the hearing justice based his conclusion that Dawn and Irving are unfit constitutes clear and convincing evidence of conduct that would be "seriously detrimental" to Kayla. The respondents further contend that, even if the factual findings relied on by the hearing justice are viewed as a whole, DCYF's burden of proving unfitness by clear and convincing evidence still has not been met.

In his decision, the hearing justice acknowledged that at least one DCYF witness testified that Dawn and Irving were compliant with the parent aide to whom they had been referred. At the same time, however, the hearing justice pointed to the testimony of several other witnesses who testified that Dawn and Irving would probably not progress to the point where they could safely parent Kayla.

For example, the hearing justice pointed to the testimony of Lisa Granda, a representative from the Partners in Permanency program who met with Dawn and Irving on a weekly basis and who testified that, although the two parents "tried and were consistent in their meetings with

her, * * * they just could not understand their responsibilities." In what the hearing justice considered to be significant testimony, Ms. Granda stated that the parents had made minimal progress and had been unable to demonstrate that they could "safely and effectively parent Kayla without continued supervision and ongoing interventions and directions." The hearing justice also pointed to Ms. Granda's observation that respondents seemed unable to develop the skills necessary to avoid conflict.

The hearing justice also referred in his decision to the report of Dr. Steven Hirsch, a clinical psychologist who had evaluated Dawn and Irving. With respect to Dawn, Dr. Hirsch's report stated: "Her psychological makeup indicates that she would have difficulty emotionally bonding to a young child. She has a tendency to put her own needs first." With respect to Irving, Dr. Hirsch's report stated: "His emotional and cognitive functioning indicates that he has difficulty adequately caring for himself, let alone the special needs of a developmentally delayed eighteen month old child." Doctor Hirsch indicated that future psychological social services were not recommended for Dawn and Irving and that their parental rights should be terminated.

The hearing justice also pointed to the report of The Providence Center, the organization to which Dawn and Irving had been referred by DCYF for an assessment relative to the possibility of reunification. That report stated: "In conjunction with parents' observed tendency to misread Kayla's cues are their own unique ways of dealing with the stressors that a toddler presents. * * * These responses to Kayla's cues could and did result in Kayla's needs not being met." After reviewing the report, the hearing justice made two observations: (1) that Dawn and

Irving loved Kayla and she loved them; and (2) that, unfortunately, the parents could not properly parent Kayla.[10]

Finally, the hearing justice referred to the testimony of various witnesses concerning specific instances in which Dawn and Irving had interacted with Kayla. These instances generally involved the parents' difficulty in controlling Kayla's behavior. The hearing justice also cited Dawn's reaction to her daughter's misbehavior, which often involved Dawn's leaving the house angrily. There was also testimony that Dawn often had to be told to get off the phone during times when she was supposed to have been visiting with Kayla. The hearing justice also noted that, although Dawn and Irving had learned how to use a nebulizer, which Kayla often needed for difficulty breathing, they did not understand when the nebulizer was to be used.

We are well aware of the gravity of a judicial decision that results in the termination of parental rights. We are in full agreement with the Supreme Court of Virginia when it stated: "The termination of parental rights is a grave, drastic, and irreversible action." *Lowe v. Department of Public Welfare of Richmond,* 343 S.E.2d 70, 72 (Va. 1986). Nevertheless, there are times when such an action must be taken.

Although in the instant case it is clear that Dawn and Irving love Kayla and have largely complied with the

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[10] These observations of the trial justice poignantly summarize the inherently tragic nature of this case. The truth is that John Lennon was not entirely correct when he famously declared: "Love is all you need."

various recommendations of DCYF, in the end we can perceive no clear error in the factual findings of the Family Court justice, nor do we disagree with his conclusion, which he reached after exhaustive review of the testimony of several witnesses, that reunification could never have been achieved. Consequently, we affirm the hearing justice's determination that Dawn and Irving were unfit to parent Kayla.

D
Kayla's Best Interests

The respondents contend on appeal that, even if this Court should uphold (as indeed we do) the hearing justice's determination that Dawn and Irving are unfit, he nevertheless erred in finding that the termination of their parental rights was in Kayla's best interests. We disagree with this contention.

In arguing that terminating the parental rights of Dawn and Irving is contrary to Kayla's best interests, respondents have brought to our attention the following passage from an article in the Harvard Law Review:

> "No child should be endangered by the foolhardy suggestion that he can thrive solely on the love of a parent, but neither should that parent's love be diminished by an insensitive, mechanistic process that singlemindedly extols the virtues of rationality." Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent,* 103 Harv. L. Rev. 1201, 1257 (1990).

No one would contend that there is any shortage of love for this child emanating from any of the persons involved in

this heart-wrenching case. If Kayla could thrive solely on her parents' love, the hearing justice's analysis of her best interests may have been different. It is our view, however, that, far from undervaluing the parents' love in the instant case by resorting to an "insensitive, mechanistic process," the hearing justice, who aptly described the case as one involving "a situation which is fraught with heartbreaking emotions," painstakingly articulated his findings in a very comprehensive decision and reached a conclusion that we consider to be sustainable.

We perceive no clear error in the hearing justice's "best interests" determination. In particular, it is our view that he properly saw much significance in the fact that Kayla has bonded with her half-sister and with her foster family, with whom she has lived since her birth more than six years ago. While not giving exclusive weight to that factor, the hearing justice appropriately considered the preservation of that bond in determining where the best interests of the child lie in this case.

After carefully considering the record, we affirm the hearing justice's determination with respect to Kayla's best interests.

II
Petition for Open Adoption

With respect to the hearing justice's denial of the petition for adoption, respondents contend that Dawn and Irving retained the right to consent to Kayla's adoption prior to a final termination of their parental rights and that, by going forward with DCYF's petition for termination, the Family Court "short-circuited" their fundamental right to consent to the adoption. In addition, they contend

that the Family Court should have deferred to their preference as to who would be a suitable adoptive parent for Kayla and that the denial of the adoption petition was contrary to Kayla's best interests. Finally, respondents contend that Sandra is a fit and proper relative to adopt Kayla and that the amount of time that Kayla has spent with her foster family should not control the outcome of this case.

Contrary to respondents' contentions on appeal, it is our view that the hearing justice properly rejected the joint petition for an open adoption in the instant case. Open adoptions are creatures of statute, and the relevant statute, § 15-7-14.1(b)(4), expressly requires that, before the Family Court may in its discretion approve a proposed open adoption, DCYF or another licensed child placement agency and the child's guardian ad litem or court-appointed special advocate must first recommend to the court that the open adoption agreement be approved.[11] In the instant case, it is clear that DCYF did not recommend that the Family Court approve the petition for adoption and the accompanying decree of open adoption filed by

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[11] Section 15-7-14.1(b) reads, in pertinent part, as follows:

"A court may grant post-adoption privileges if:

"(1) The court determines that the best interests of the child would be served by granting post-adoption privileges; [and]

"* * *

"(4) The department of children, youth and families and the child's court appointed special advocate or the guardian ad litem, if one has been appointed * * *, recommends that the post-adoption privileges agreement be approved by the court; or if the adoption petition is being sponsored by a licensed child placing agency other than the department of children, youth, and families, the licensed placing agency sponsoring the adoption makes a recommendation that the post-adoption privileges agreement be approved by the court."

Sandra and consented to by Dawn and Irving. Absent such a recommendation by DCYF, the Family Court was statutorily barred from considering the petition for open adoption. This would have been true even if the Family Court had not already terminated Dawn and Irving's parental rights prior to making its determination on the adoption petition.[12]

Moreover, the hearing justice determined that it would not be in Kayla's best interests to have her move from the home of her foster parents, where she has lived for her entire life with her half-sister, to the home of her aunt, Sandra. He found that Kayla and her half-sister are closely bonded and that to move her would "rupture the close relations" between the two. In concluding that the open adoption was not in Kayla's best interests, the hearing justice also noted that Kayla had bonded closely with her foster parents. Section 15-7-14.1(b)(1) requires a court to first determine that the best interests of the child would be served before it may grant post-adoption privileges. In the instant case, the hearing justice found the converse to be true – *i.e.,* that Kayla's best interests would best be served by her remaining with the foster parents. We cannot say that he clearly erred in so finding. Consequently, we affirm the hearing justice's denial of the adoption petition.

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[12] Because we conclude that the Family Court lacked the statutory authority to consider the open adoption agreement, we do not address the serious issues raised by respondents concerning the "fundamental interest" of parents in determining who should be permitted to adopt their child before the termination of their parental rights.

Conclusion

For the reasons set forth herein, we affirm the Family Court's judgment. The record may be remanded to the Family Court.

APPENDIX B

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. FAMILY COURT

IN RE: KAYLA FC NO. P 01-0101

DECISION

John A. Mutter
Associate Justice
Rhode Island Family Court

APPEARANCES:

For DCYF ..... Karen Clark, Esquire
For CASA ..... John J. O'Brien, III, Esquire
For Respondent Father ..... Lia Stuhlstaz, Esquire
For Respondent Mother ..... Frank Pannozzi, Esquire
Guardian ad Litem for
Respondent Mother ..... Timothy Morgan, Esquire
For Petitioning Aunt (Adoption) ..... Robert Caron, Esquire

DECISION

MUTTER, J. This matter was heard over an extended period of time. The facts are, for the most part, undisputed.

A. Kayla was born April 13, 2000.

B. Kayla was the first child fathered by the Respondent Father, although this was his third marriage.

C. The Respondent Mother, prior to the birth of Kayla, had given birth to another child named Michelle, who had been fathered by another man. In 1998, the Respondent Mother did a voluntary consent as to this child, who was adopted by her foster parents.

D. At the time of Kayla's birth, there were no relatives of the biological parents with whom she could be placed, though the Department of Children, Youth and Families made efforts to place the child in relative foster placement.

E. Kayla reportedly has certain development delays.

F. By expert testimony, both of the biological parents have been described as mildly retarded.

G. Kayla, upon her release from the hospital at age thirteen days, was placed with the same foster parents who had adopted her half-sister. Michelle and she had never lived any other place to the present time.

H. On December 1, 2001, the Respondents admitted to an allegation of dependency based upon their cognitive limitations.

I. A Petition for Termination of Parental Rights was filed on January 10, 2002.

J. In April of 2002, a Petition for Adoption was filed, signed by the Respondent parents, giving consent to the adoption of Kayla by the Respondent Father's sister, Sandra.

K. The Respondents, after the commencement of hearing on the Termination Petition, sought the intervention of the Rhode Island Supreme Court, requesting that the Supreme Court order that the Adoption Petition be given a priority hearing. The higher court ordered that both petitions be entertained by this Court at the same time.

This Court then proceeded to hear both petitions. Testimony relative to the Termination Petition was completed and testimony immediately began on the Adoption Petition.

A REVIEW OF THE TESTIMONY FOLLOWS.

The facts of the case are, as has been previously stated, quite straight forward, and there is little or no conflict as to the facts. The law of the case is equally uncomplicated. The difficulty is in applying the law to the facts, as revealed by oral and written testimony, in a situation which is fraught with heartbreaking emotions and in which there are so many innocent parties. This Court is aware that whatever decision it reaches, based upon the evidence produced, that heartbreak will be inflicted upon some or all of the parties involved.

The Termination Petition alleges: (1) The child has been placed in the legal custody or care of the Department of Children, Youth and Families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed and provided further that there is not a substantial probability that the child will be able to be returned safely to the parents, considering the child's age and need for a permanent home. (2) The parents have exhibited behavior or conduct that is seriously detrimental to the child, of such duration to render it impossible for the parents to care for the child for an extended period of time.

The State called as its first witness ***Brenda Almeida.*** Ms. Almeida had been employed by the DCYF for a period of twenty-two years, being promoted to Supervisor, a position she has held for the last five years.

The witness first became involved with the Respondent Mother in 1998, at which time Mother had given birth to her first child. Witness was involved with the case until September 2000. This child's name was Michelle. Mother did a voluntary consent and the child was adopted by the foster parents with whom she had been living. Subsequently, Mother married the present Respondent Father who, it is reported, had been married twice previously. Respondent Mother became pregnant with the child who is the subject of this case. The Department apparently had certain misgivings regarding this child, in view of Mother's inability to care for her first child and with reported difficulty with the extended family. Maternal grandmother threatened the Respondent Father, as well as the unborn child. She threatened to kill the Father as well as the child and "would cook and eat the child." It was felt that the child could not be placed at home, in view of what were considered to be unsafe conditions in the home. As per Department policy, the Respondents were asked if there was anyone available for relative foster placement. The Respondent Mother indicated she had no relatives with whom the child could be placed. Respondent Father indicated a niece, Miss Lopes, or in the alternative, his unmarried sister, Sandra.

In March 2000, the worker spoke to both. Miss Lopes was ruled out, as she had an active case with the Department. At that time, Sandra was caring for two terminally ill relatives, as well as having two nieces and the two children of one of the nieces living with her. Sandra felt that she could not take the child at the time she was going to be born and stated that she felt that the child would be best served by placing her with the foster family that adopted Michelle, and she would be with her older sister.

Thirteen days after she was born, April 13, 2000, Kayla was placed in the foster home with her half-sister, where she remains to this day.

A referral was made to SPURWINK for parenting. A visitation schedule was set up, whereby visitation would take place with the parents once per week in the home of the parents, supervised by Spurwink case aide, Elsa Horton.

A case plan was prepared, ***State 1 Full***. The goal of the case plan was reunification with parents. The plan was dated May 25, 2000 and signed by both parents.

The witness testified that frequently, the foster mother would bring Kayla for the visits, and she observed that the foster mother was very caring and loving of the child.

The witness also testified that at birth, it was felt that Kayla would have some developmental delays.

The State called its second witness, ***Gail O'kai***, an employee of the Department for three years. At the time she took over the case in September of 2000, Spurwink was already involved with the family, supervising visitation. The objects to be met were: providing a safe home for the child, mental health issues to be addressed, parenting skills and family relationships to be strengthened.

In February of 2001, the worker made a referral to St. Mary's for parent education. A referral was also made to Early Intervention.

A referral was made to John Hope for the Respondent Father for parent education. Father told the worker that

his attorney told him that he did not have to go for parenting education.

The witness testified that from her observations, the Respondents were compliant with the parent aide.

A referral was made to the Family Learning Center.

The witness prepared only one case plan, ***State 2 Full*** dated November 4, 2001, signed by both parents, with a goal of reunification with parents.

The witness observed that the child, Kayla, and the foster parents had become very bonded. Kayla would become upset if her foster mother was not in her line of sight. The foster father "adored" the child.

The eyewitness testified that Spurwink never recommended increased visitation for the parents and child.

Spurwink, in December 2000, requested additional 005's. They made the same request on January 4, 2001. They were not provided with same.

The witness made a referral for a parent/child evaluation.

The witness stated that the visitation supervisor reported that mother had threatened her and refused to supervise any further visitation. It was necessary to change the visitation arrangement.

On April 5, 2001, ***Respondent's 4 Full,*** the Court ordered unsupervised visitation.

In a court letter presented on March 22, 2001, the worker stated that she had not received any information from John Hope regarding visitation. In fact, John Hope

had sent a letter dated March 21, 2001 recommending unsupervised visitation to the worker. The worker testified that she did not receive the letter until after the March 22nd hearing. The Court was less than pleased with the explanation of the worker, and on April 27, 2001, ordered a new social worker and unit assigned to the case forthwith.

State called ***Lisa Granda***, a representative of Children's Friend and Service, Partners in Permanency Program, whose goal is to provide comprehensive services to families, foster families and children in care.

The witness held prior employment as a mental health worker for eight years at Butler Hospital. She had also been employed at Atwood House, a treatment center for adolescent girls.

Ms. Granda had an undergraduate degree in psychology and a Masters degree in clinical social work from Boston University. The witness was qualified as a clinical social worker.

The purpose of the agency is to provide home-based counseling services to birth families, individualized according to their need.

The first contact she had with the Respondents was on June 6, 2001, after first discussing the case with the Department social worker and supervisor, the birth family and the foster family to ensure that all were in accord. For the services of this program to go into effect and to be applicable, the child has to be in a concurrent permanency position.

The issues presented were reunification, parenting, mental health counseling and a safe environment for the child. She met with the Respondents four times in their

home on a weekly basis prior to setting up any case plan. She continued to see the Respondents weekly for approximately one year. A lengthy assessment form had to be filled out. The initial case plan was to develop parenting skills in the biological parents, then issues developed around their home, which then became the focus of the home visits.

Respondent Mother reported having an argument with a thirteen year old boy who lived on the third floor. She reported that he had called her names, so she punched him. Mother reported that the boy was running through the building with a knife. Mother reported there were numerous problems within the apartment house. She reported having a dispute with the landlord who, she said, threw a chair at her. Mother stated that there were people within the building who had threatened to burn the building down. She said that a fire had been lit in the building and the Fire Department had responded.

In view of the circumstances, the worker felt it was unsafe for Kayla's visitations to be in that house. The visits were continued on a weekly basis, but at the office of the witness. Eventually, visitation was moved to Aunt Sandra's home in August 2001.

Respondent Mother complained of difficulties with a nephew who was living with the aunt who was supervising the visits.

It was suggested to the parents that they move from their apartment house, which was considered unsafe in view of mother's reports. The parents still reside in the same apartment.

Ms. Granda testified that, in her opinion, the parents tried and were consistent in their meetings with her, but that they just could not understand their responsibilities.

Since February of 2002, this witness only observed a few visits between parents and Kayla, during which time, they engaged with the child in varying degrees.

On September 17, 2001, the parents argued in front of the child. Respondent father was angry with the mother because she had taken the child into Dunkin' Donuts, to which he objected.

The witness reported that mother would become upset when she had to go to Court but that she would calm her down and redirect her.

A parent/child evaluation was done at The Providence Center on July 11, 24, and August 8, 2001. Psychiatric and psychological evaluations were done of both Respondent parents – Respondent Father, on October 12, 2001 and Respondent Mother, on October 11, 2001.

Under cross examination, the witness stated that the program she was involved with was not specifically designed for parents with a disability of mental retardation, but that forty-two percent of the families that she worked with were cognitively limited.

The witness testified that the apartment of the Respondents was clean, tidy and appropriate.

The testimony of this witness indicated that the social worker from DCYF, that social worker's supervisor, a representative from Early Intervention, and a representative from the VNA Health Tomorrows at a case conference on July 23, 2001, all expressed concern as to the parents'

ability to keep Kayla safe in that apartment. Mother reported that she had called the police to report that a former tenant on the first floor had threatened to burn the house down. She also reported that a former tenant had made threats against her. Despite their concerns, the Respondents refused to move. The observation was made that the parents did not seem to be able to gauge the risks posed to them and to the child. A letter signed by the witness and Tricia Kennedy of Partners in Permanency stated, "Due to the limited awareness and insight, that (the respondents) have been unable to maintain a safe environment, therefore, the Partners in Permanency program supports the DCYF recommendation to terminate overnight visitation (in the home of the parents).

It was brought out in cross examination that prior to Partners in Permanency becoming involved in the case, the child must already have been placed in a foster home.

Ms. Granda had met with the parents once a week for a period of three months before she recommended termination. She testified that she had been working with the parents on parent/child relationship issues, effective interpersonal communication skills and how their conflicts impacted Kayla adversely.

In what this Court considered significant testimony, she stated that the parents had made minimal progress and have been unable to demonstrate that they can safely and effectively parent Kayla *without continued supervision and ongoing interventions and directions. The Respondents seem unable to develop the skills necessary to avoid conflict. "The primary goal of our program is to assist and support the parents' case plan goal of reunification. However, first and foremost, we need to consider the safety and*

well being of Kayla, and at the same time, preserve connections and seek to establish timely permanency." The witness stated that the foster parents would have had as much time spent with them as with the biological parents.

The state called ***Dr. Steven Hirsh*** who was qualified as a clinical psychologist. The parents were referred to him for psychological evaluation. Testing was done in late September or early October 2001. The evaluation was conducted at his office over the course of two sessions commencing September 28, 2001. The first session lasted one hour and twenty minutes; the second session lasted fifty minutes. Each of the parents was evaluated individually. The doctor had referred to a history given him by the Department, as well as the history which he took himself from the parents. The doctor testified that he first did a clinical interview and then specific tests.

The Department had given the doctor a history of the mother, indicating that she had been emotionally and sexually abused as a child. The mother denied this history. The doctor felt that this response was typical of how she copes and reacts with other people.

The doctor testified that he did the standardized tests, including the Wechsler test, verbal and non-verbal; incomplete sentence test and the ink blot tests. The same tests were done with both respondents.

State Exhibit 6 Full – Report of Dr. Hirsh as to Respondent Mother.

Mother's history indicated that her first child was placed right after birth and subsequently adopted by the foster parents. Kayla is placed in the same foster home.

Mother was alert, cooperative and oriented in all three spheres. There were indicated cases of physical, sexual and emotional abuse of mother, as well as a history of fire setting, all of which mother denied.

Mother was within the mildly retarded range. Sixty-four (64) full scale I.Q. level. Her reading skills were at fifth grade level and math skills at the first percentile for adults her age. The doctor testified that Respondent Mother is a very psychologically immature adult. The doctor's report states: *"Mother is a very self-centered person who frequently manipulates the truth for her own benefit. Her psychological makeup indicates that she would have difficulty emotionally bonding to a young child. She has a tendency to put her own needs first. She becomes jealous of her husband as well as her child, all of which reflects the presence of a personality disorder with narcissistic and borderline characteristics . . . " "Kayla is 18 months of age. She deserves to grow and develop in a healthy family system that will provide her with emotional stability and permanency." The doctor recommended that the parents' rights be terminated and felt that future psychological social services were not recommended.* (emphasis added)

State Exhibit 7 Full – Report of Dr. Hirsh as to Respondent Father

Father had been married three times. He was alert, cooperative and oriented. He was found to be mildly mentally retarded with a full scale I.Q. of sixty-one (61). Academic skills are below third grade level. The doctor stated that Father suffered from a personality disorder with passive dependent features. Father and Mother

shared household tasks. Father's sister assisted with money management. Both parents receive Social Security benefits. *The doctor states: "His emotional and cognitive functioning indicates that he has difficulty adequately caring for himself, let alone the special needs of a developmentally delayed eighteen month old child."* (emphasis added)

Under cross examination, the doctor stated that he had no direct information as to how the Respondent Mother behaved with the child during visitations.

The State then called ***Amy Welch***, the present social worker on the case. Ms. Welch took over the case from Ms. O'kai.

The witness met with the parents. There had been an earlier referral to Early Intervention but service was not yet in place.

Ms. Welch made a referral to Project Early Start, but they were not able to provide services. To be eligible for their service, the child had to be placed in the home.

A referral was made to the VNA, as the child had medical problems. A referral was made to Partners in Permanency.

A referral was made for mother to the Trauma Center, based upon her history of abuse. This referral was made in May of 2001.

On May 31, 2001, the parents were referred to Haven Miles of The Providence Center for a parent/child evaluation.

In June of 2001, Mother was referred to the Comprehensive Community Action Program.

In September 2001, a referral was made to Dr. Steven Hirsh for a psychological evaluation of both parents.

In September 2001, parents were referred to Dr. Sadigshi for a psychiatric evaluation.

Parent/child visitation was originally maintained at two visits per week, each visit for two hours.

The worker provided transportation from day care or foster parents' home to the visits and back.

The parents complied with the referrals. (emphasis added)

The Respondent Mother started going to counseling in July of 2001. She went for several weeks then said she was finished and was not going any more. She stopped.

On May 21, 2001, the visits were changed to one two-hour visit per week and one overnight visit per week, both unsupervised at the home of the parents. In August, the visits were again changed to one four-hour visit per week and one overnight visit per week, supervised by the Respondent Father's sister, Sandra.

It was observed that the parents had been advised that to help Kayla learn to play properly, it was best to give her one toy at a time, which would enable her to concentrate more fully. Despite the advice, the parents would dump a whole bag of toys out onto the floor and then just sit back and watch. They did not work with the child.

The worker prepared three case plans – two had a case plan goal of reunification; the third case plan goal was adoption.

The witness testified that she also had the opportunity to observe Kayla in the home of the foster parents. She stated that there appeared to be a very close and loving relationship between Kayla and the foster parents as well as between Kayla and her half-sister, Michelle. She observed them often at play.

The one overnight supervised visitation at aunt Sandra's continued to the present.

The Termination Petition was filed on January 10, 2002. The worker explained that case plan 4 had been signed prior to the termination being filed, but the case plan had been lost and a duplicate original was signed after the filing of the termination.

State Exhibit 10 Full – Report From The Providence Center.

State Exhibit 11 Full – Report of Dr. David Savitski as to Respondent Mother.

State Exhibit 12 Full – Report of Dr. Savitski as to Respondent Father.

Reference is made to ***Exhibit 10***. The Department had referred the parents to The Providence Center to access the possibility of reunification of child with parents. The parent/child evaluation was done on July 11, 24 and August 8, 2001. The report was based upon a history received from the Department, conversation with Amy Walek and from direct contact with the parents over three one-hour sessions.

The report stated: *"In conjunction with parents' observed tendency to misread Kayla's cues are their own unique ways of dealing with the stressors that a toddler presents. Father is observed as becoming anxious in response to Kayla's behaviors, while Mother appears to become removed, focusing on concrete tasks such as diapering. These responses to Kayla's cues could and did result in Kayla's needs not being met."*

Continued visitation was recommended so that the Department could monitor the parents' ability to care for Kayla.

It is the Court's observation from reviewing the report in detail that two things are obvious – That the parents loved Kayla and she them, and unfortunately, the parents, at least at the time of that evaluation, could not properly parent Kayla. (emphasis added)

Reference is made to ***Exhibit 11***. The psychiatric evaluation of Mother was dated October 11, 2001. The history that Mother gave the doctor was, according to the doctor, grossly divergent from that documented in previous assessments, including the documentation of her level of functioning at age fifteen. Mother was unable to give any reason for the loss of her parental rights to her first child and the loss of custody of her second child. The description Mother gave of her medical condition diverged from previous descriptions documented in her record.

Mother acknowledged that there had been conflicts between her mother and her husband.

Mother displayed consistent use of distortion, outright lies, mis-remembering and evasion in order to proceed with her stated goal.

According to the doctor's report, mother stated that she suffered from asthma or emphysema, used a nebulizer and continues to smoke one-half pack Camels per day. She reported being in a coma in 1997 as a result of domestic violence. There was nothing in the records to document any of these statements.

Mother was unable to describe Kayla's development or any of her likes and dislikes. She did report that her first child had been adopted by the foster parents with whom Kayla had been placed.

Mother reported being sexually abused by her father at age eight. None of the details she gave could be documented.

Mother said that she was a student at CCRI, studying day care for certification.

The doctor agreed with a previous diagnosis of mild mental retardation, borderline intellectual functioning and personality disorder. There was no evidence of other major mental illness.

It was the doctor's conclusion that mother's lack of empathy and inability to use language truthfully and her inflexible approach to meeting her own needs are likely to grossly impair her ability to effectively parent her daughter. (emphasis added)

State Exhibit 2 Full – Psychiatric Report of Evaluation of Respondent Father.

The report indicated that Father described his affection for his wife and daughter, repeating himself for emphasis. *Father felt that he and his wife were perfectly*

capable of caring for Kayla. He was pleased with his capacity to feed Kayla and change her diapers. He could not express a more abstract articulation of what the child's needs may be. In the opinion of the doctor, Father, despite his affection for the child, had limited capacity to intuit the needs of the child and to respond to those needs in a timely fashion. Father has not been able to shield the child from the chaotic people in his life. When asked to name the most important people in his life, he identified two of his sisters, two of his nieces and one of his nephews. He did not mention his wife or child. (emphasis added)

Respondent Father receives SSI.

The doctor concluded that Father would not be able to respond to Kayla's needs without extensive and ongoing site prompting and supervision. The records indicate Kayla suffers from developmental delays and is likely to require a level of consistency and empathetic response which he is not going to be able to provide. (emphasis added)

Amy Walek testified that the VNA had reported that the parents had successfully learned to use a nebulizer, which Kayla frequently needed.

On July 12, 2001, Mother called Ms. Walek at her office at 6:00 AM and left a message that Kayla was having trouble breathing and wanted to know if she should use the nebulizer. By the time the worker got to the office and called the Respondent Mother, she reported that it was alright and that Kayla had begun to breathe normally. It is the observation of the Court, based upon this testimony that the parents knew how to physically use the nebulizer; they did not understand when it was to be used.

Ms. Walek stated that as a result of the reports of the parents as to trouble with other tenants in the house, as well as with the landlord, the location was considered unsafe and the visitations were moved to Sandra's house, with her permission, so that she could supervise the visitations.

The landlord is still the payee on Mother's Social Security.

The parents, to this day, remain in the same apartment. Respondent Father has inquired about moving to Warwick, in the vicinity of where his sister lives. Mother refused to move, and Father refused to leave Mother. Visitation was never returned to the home of the parents.

The witness reported that during a visit on December 21, 2001, Father did a better job of playing with Kayla than did Mother, who would leave frequently to visit neighbors or make telephone calls. On a consistent basis, it was only the Respondent Father who interacted with the child.

The Evidence indicated that the respondents had extensive visitations and cancelled very few. (emphasis added)

The State called ***John Surrette***, a case aide technician at the Department of Children, Youth and Families. He had been so employed for seventeen years. Mr. Surrette supervised some of the visitations.

The witness had his first contact with the Respondents in October or November of 2001.

During a visit on February 18, 2002, in which he observed Kayla running around the house with Father

chasing her, Mother got angry and left the house. The witness reported that this reaction by the mother happened frequently.

At times during visits, during the first hour, Father spent ten minutes with the child and the rest of the time cleaning up. Mother watched television. Witness would sometimes have to tell Mother to get off the phone.

The witness reported that the home was clean. At times when witness was present during lunch hour, Kayla was given a lunch which was appropriate.

During a visit on April 11, 2002, Kayla had colored markers and was writing on her clothing and her hands. Mother tried to take the markers away from Kayla but could not.

All parties rested as to the Termination Petition portion of the case.

In argument, Mr. Pannozzi argued on behalf of the Respondent Mother that reasonable efforts were not made to reunite the child with the parents. His argument was to the effect that because the Respondents were found to be mildly mentally retarded that reasonable efforts to effectuate reunification were not sufficient, but that special efforts were required. He referred to the ***Americans with Disabilities Act***. It is the opinion of this Court, which is supported by authorities, that the referred to Act is not applicable in cases such as the instant case. Respondent Father argued that if the Court agreed that when the Department first became involved with this case, their efforts to assist the family were less than might be expected, even if subsequent case workers made all reasonable or even extraordinary efforts to unify, the Termination

Petition must fail as reasonable efforts must begin from day one.

The Court, after carefully examining all of the evidence in its totality, cannot subscribe to this argument. Even if, for the sake of argument, it was admitted that initially the social worker involved in this case was less than might be expected, this Court cannot substitute its judgment for the worker who was on the scene. With the exception of the actions of Ms. O'Kai, who delayed presenting to this Court the report which recommended unsupervised visitation and within days was corrected by order of the Court granting the visitation and removing Ms. O'Kai from the case and ordering a new social worker and new unit assigned to the case, the Court cannot refer to a specific instance of improper conduct on the part of the Department. The Court further opines that the actions of subsequent workers and aides were performed with the goal of reunification with parents.

The Guardian ad Litem was allowed to present his argument without objection by any of the parties. He argued that special efforts should have been made, as it applies to the Mother, but were not needed as to Father. The Guardian argued that in this case, as in all cases involving the Department, they had their own agenda and it had been his experience in all of his dealing with the Department that they were impossible to deal with. It appeared to this Court that the Guardian also had his own agenda when it came to his dealing with the Department.

In argument, the Respondents pointed out that an example of the Departments failure to carry through with planning with the parents was the failure of the Department to provide additional 005S when they were

requested by Spurwink and as a result, the services of Spurwink were terminated. However, ***State Exhibit 13*** refutes this argument. This report from Spurwink states that they were terminating their services not for nonpayment but because of unsafe conditions in the home, specifically that the worker from Spurwink supervising visitations refused to supervise because of unsafe conditions resulting from the Respondent Mother's conduct.

The Court began the hearing on the Adoption Petition filed by the aunt, Sandra, which was signed by the Respondent parents giving their consent to the adoption.

Respondent Father was called as a witness by his counsel. He identified his signature on the Adoption Petition and indicated that he had signed the same in April of 2002. At that time, according to Father, his sister, Sandra, had been supervising the weekly visits for about nine months. He testified that he thought Sandra was a good person and would take good care of Kayla. Respondent Father testified that he understood that if the Adoption Petition was granted, he would lose his parental rights as Kayla's father but that this would allow him to have contact with his daughter.

The Court questioned the witness as to his intent in signing the Adoption petition.

Q. Are you doing this because you realize that through the termination you may not see her (Kayla) at all?

A. Yup.

Q. Do you feel that you could take care of Kayla, yourself and your wife?

A. No.

Q. Do you have some doubts as to whether you and your wife together could take care of her?

A. Yeah.

Q. When did you begin to have those doubts?

A. I don't remember Your Honor.

Respondent Mother was called as a witness by her counsel. Mother identified her signature on the Adoption Petition and testified that she did it freely and voluntarily. Respondent Mother stated that she understood she was in effect giving up her parental rights. She also testified that she understood that by the terms of the open adoption agreement, she would be allowed to see Kayla once a month.

The Court posed some questions to the Respondent Mother.

Q. Do you think that you and your husband could take care of Kayla?

A. Not without help, Your Honor

Q. What kind of help would you need?

A. Kayla has special needs. She needs special help like programs to help us follow Kayla's issues.

Mr. Caron called his client, ***Sandra.***

Sandra is the person presenting the Adoption Petition. She is the sister of the Respondent Father.

Sandra testified that she has lived at the same address in Warwick for over thirty years. Living with her are her two nieces, Sandra Jones and Karen Nardolillo, and

Sandra Jones' two children, Robert and Michael. Her niece, Sandra, has lived with her all of the niece's life, some thirty years.

The witness identified her signature on the Adoption Petition, as well as the open adoption agreement.

The witness testified that her mother had died when the Respondent Father was only four years of age, and she took care of him. She testified that it was her primary responsibility to take care of her brother.

The witness testified that she had met with a representative of the Department prior to Kayla's birth to discuss where the child could be placed upon her birth, as the Respondents' home was not considered safe at that time. The witness stated that she was told that the Respondent Father would never get placement of the child (This was later amended that the Respondent Father would never get placement of the child as long as he remained with the Respondent Mother as she was not considered a safe guardian for the child). The witness testified that she was asked if she could take placement of the child when Kayla was released from the hospital. The witness refused. She stated that at that time, she was caring for her sick mother as well as a brother with a heart condition. The brother with the heart condition died January 6, 2001, which was approximately nine months after Kayla had been placed in a foster home with her half-sister, who had been adopted by these foster parents. The witness testified she was also caring for her brother's sister, who was a diabetic, had cancer and was blind. She was living with the witness until her death on November 16, 2001. The witness testified that in August of 2001, she was asked if she could supervise an overnight visitation between the parents and Kayla

once a week, as other visitation arrangements had failed. (emphasis added)

The witness testified that at first, all she did was supervise the visits, but as time went on, she became bonded to Kayla as a result of the one overnight visit per week that Kayla spent at her house. *The overnight visitation with the Respondents, which took place at her house, began in August of 2001.* (emphasis added) The witness testified that the Department had checked out everyone living in her home before they allowed the overnight visitations.

Sandra testified that she began to feed Kayla to ensure that she was eating properly, but that the parents were bathing Kayla and "things like that". She stated that Kayla was fond of everyone in her home but did not know everyone's name. *the witness said she felt it was in Kayla's best interest to be with her because of her brother's limitations. She felt that the only special need that Kayla had was a little delay in her speech. The witness stated that she could not have taken Kayla in until after the death of her niece in November of 2001. She said that when Kayla comes to visit at her home, she talks about her sister, Michelle. The witness had filed a Motion to Change Placement of Kayla from the foster home to her home after receiving authorization from the Respondents to do so. The motion for change of placement was heard in January of 2002 and was denied by this Court as not being in Kayla's best interest.*

The witness was definite in her statement that in her opinion, the Respondents could not take care of Kayla by themselves. The witness stated that she had problems with her neck and suffered from chronic pain for the last twenty

years. She said that she could lift Kayla but could not carry her due to her neck condition. (emphasis added)

> ***Q. You've taken care of your brother who died and you have taken care of your nieces and nephews?***
>
> ***A. Yes, you know I even get attached to animals.***
>
> ***Q. Suppose your brother showed up and you had adopted the child and said he wanted to see the baby?***
>
> ***A. I told them they could come over once in awhile but not all the time.***

The witness felt that she was a closer relative to Kayla because she was a "full aunt" rather than a half sister. She said if she was allowed to adopt Kayla she would try to foster visits between Kayla and Michelle. (emphasis added)

> **Q. If the shoe was on the other foot, would you be satisfied if the foster parents said to you, "We would be pleased to let you visit once a week?"**
>
> **A. I would have at one time, but now.**

Mr. Caron then called Sandra's Niece, ***Karen***.

Karen testified that she had lived with her Aunt, Sandra, for the last thirty years. It was Karen's father that Sandra had cared for until his death in January of 2001.

The witness felt that there was a bond between Kayla and Sandra.

Karen testified that Sandra had also cared for her sister until she died recently.

Counsel for Sandra then presented a video tape which depicted a little girl at an outdoor party and apparently having a good time. It was Kayla's birthday party given by Aunt Sandra. There was nothing remarkable about the video, with children running about, with grownups watching their antics. The Court is of the opinion that the video was taken to be used for the purpose for which it was used – in Court. The video, in the opinion of the Court, neither added to nor detracted from the merits of the case.

Mr. Caron called ***Robert Jones***, one of the nephews living in Sandra's house. He testified that he was seventeen years old and had lived with his aunt Sandra all of his life. It was his opinion that Kayla and his aunt had bonded as a result of the once per week overnight visitations which the aunt had supervised.

When asked if the Respondents interacted with Kayla during visitations, he replied, "A bit." (emphasis added)

This concluded the direct testimony on behalf of the aunt Sandra relative to her Petition to adopt Kayla.

The State called as its first witness, Kayla's foster father, ***George Mergner***. He testified that Kayla had been placed in his home, with he and his wife acting as foster parents. Kayla was placed with them shortly after her birth and had resided with them constantly since that time. At the time of this hearing, it had been over two and one-half years. The witness stated that he lives with his wife and another child that they had adopted, Michelle, who was Kayla's half sister. His wife works two to three day per week, and he works four ten-hour days per week. Two of the five foster children they have had in their home have been reunited with their parents. *Mr. Mergner stated that Kayla was a special needs child, particularly as to her*

speech and that she attends physical therapy, as she is not physically coordinated. (emphasis added)

The witness was questioned as to the relationship between Kayla and her half-sister, Michelle, and he replied, "She follows her like a second shadow."

In response to a question, the witness stated that at such time as either of the two children express a desire to see or have contact with the biological parents, he replied, "I will do everything in my means to do so." (emphasis added)

Under cross examination by Mr. O'Brien, CASA Attorney, the witness testified that he and his wife teach Kayla her number cards, work on her speech and her ABC's. A Meeting Street School representative comes in to their home and works with Kayla.

The witness testified that Kayla refers to him as "Daddy" and refers to his wife as "Mommy". He stated that Kayla and Michelle are inseparable. They each have their own bedroom. (emphasis added)

Cross examination by Ms. Stuhlstaz brought forth the information that Michelle goes to a Catholic School Mondays, Wednesdays and Fridays for a half day. Kayla goes to day care during the week, but on Tuesdays and Thursdays, the two girls are together.

The State called ***Deborah Mergner***, Kayla's foster mother. She stated that Kayla has both a speech therapist and an occupational therapist. She testified that at the end of the day, both girls run to the door to greet "Daddy".

The witness concluded her testimony with the statement that she has to take Michelle to the doctor at least

every other week, as she has chronic ear infections and tonsillitis.

All parties rest.

The basic facts of this case have been set forth in the opening paragraphs of this Decision.

The facts are straight forward, and there is little or no contradiction in the testimony of the various witnesses. The law is also relatively clear. What is concerning to this Court is the depth of human emotions which are involved in the permanent placement of Kayla – a child that is loved by all of the parties involved.

The Family Court, though a creature of statute, sounds in equity, which demands that a just conclusion be reached based upon the totality of the evidence.

Query: If parents are unable to properly care for a child, regardless of their love for the child, are they unfit to parent that child?

Expert testimony made it clear that the Respondents cannot care for Kayla without constant on-site supervision. Both Respondent parents have testified and both have admitted substantially what the experts have averred. The petitioning aunt in the adoption matter has testified that, in her opinion, her brother cannot care for the child without the help specified by the experts. (emphasis added)

Can parents such as the respondents be found unfit to exercise parental rights?

The Court had the opportunity to observe the Respondents during the course of the lengthy hearing. The Respondent Father was subdued, placid and reserved. The Court is convinced of his love for Kayla and equally

convinced that he has no concept of what is in the best interests of the child.

The Respondent Mother was flighty, physically active and appeared quite aggressive in her reactions to certain testimony. These observations, particularly as it pertains to the Respondent Mother, were more than adequately supported by the testimony.

It is the opinion and decision of this Court that unfitness cannot only be ascribed to positive acts which are harmful, physically and/or emotionally to the child, but that the inability to act or react to a situation which could imperil the child and ultimately cause harm to the child, constitutes unfitness. Based upon this criteria, this Court finds, by clear and convincing evidence, that the Respondent Parents are unfit. There is no probability that Kayla could safely be returned to her parents' care, considering the mental and emotional condition of the parents and the special needs of this child, including the need for a permanent, safe and stable home, within any reasonable time. The Respondents are no more capable of caring for Kayla now than they were when she was born.

Did the Department make reasonable efforts to effectuate the reunification of Kayla with her parents?

The placement of the child in the first instance was caused in great measure by the aggressive behavior of the Respondent Mother. The Department rightfully sought relative placement for the child. Respondent Mother had no suggestions for relative placement. The Respondent Father suggested a niece. That placement was rejected based upon the contact that the Department had with that niece.

Respondent Father's sister, Sandra, rejected the placement for very good reason – her on-going care of several terminally ill relatives. This resulted in the placement of Kayla, upon her release from the hospital after her birth, in the foster home which had previously adopted the Respondent Mother's first child, Michelle.

It is apparent from the testimony that neither the Department nor the foster parents initially considered this a permanent placement, as witness the case plan goals which called for reunification with the parents. The foster parents initially refused to acknowledge the blood relationship of Kayla and Michelle, as they did not believe this was a permanent arrangement.

Sandra did not enter into the picture at all until such time John Hope refused to supervise visitations in the Respondents' home. Their refusal to supervise was due to the aggressive nature of the Respondent Mother and the worker's statement that she felt unsafe in the presence of the mother.

Sandra, not wishing to deprive her brother of his visitations, agreed to the one overnight visitation which she would supervise in her home. This was approximately nine months after Kayla had been placed in the foster home. Time passed without any resolution of the problem, reunification appeared out of the question, and the Department filed a Termination of Parental Rights.

It is the opinion of this Court, considering the totality of the evidence, that DCYF did make reasonable efforts to reunify parent and child. The Respondents argue that reasonable efforts were not enough – that because the parents were mildly retarded, special efforts should have been make. The Court points out that one of the workers

on the case stated that almost half of the cases she serviced dealt with people in the same medical conditions as the Respondents. There must be a limit to the extension of reasonable efforts.

Subsequent to the filing of the Termination of Parental Rights Petition, a Petition for Adoption was filed by the Respondent's sister, Sandra, which was consented to by the Respondents.

Hearing on the termination hearing was interrupted when a Petition was filed in the Rhode Island Supreme Court seeking relief, specifically requesting that the hearing on the termination petition be abated and that this Court proceed with hearing on the Adoption Petition. The Supreme Court returned the case to this Court with the instruction that both petitions be heard at the same time. Procedurally, that is what this Court has done.

This Court has ruled that the Respondents were unfit and that the grounds for termination have been proven by clear and convincing evidence and that it is in the best interest of the child, Kayla, that the parental rights of the Respondents be terminated. This Court, however, wishes to make comment on all of the evidence.

This Court, in previously heard motions on this case, as well as in the case on merits, has commented that Sandra is kind, gentle, caring woman, who, at fifty four, has been the primary caregiver for several members of her family. She has cared for terminally ill relatives until their death. For thirty years, she has taken care of two of her nieces who live with her and two of her nephews who have lived with her since their birth and who are now in their teens. She has raised the Respondent Father since the death of her parent when the Respondent Father was four

years of age. She can best be described as a "compulsive care taker." *In her own words, "I even become attached to animals."* (emphasis added) She states that she has become attached to Kayla as a result of her supervision of the once per week visitations held at her house. Sandra testified that she would foster a relationship between Kayla and her sister, Michelle, if she was allowed to adopt Michelle. That is not necessary, inasmuch as all of the testimony on the subject reveals that Kayla and Michelle are already closely bonded in the foster home. In the opinion of this Court, to move Kayla now can do nothing by rupture the close relations these two sisters have as a result of being raised together in the same home since Kayla's birth.

It is the opinion of this Court that if the Department had not filed a termination petition, there never would have been an Adoption Petition filed by the aunt and consented to by the Respondents. The testimony supports the view that the Adoption Petition was filed and consented to in the hope that it would at least guarantee that the Respondents would maintain some connection with Kayla. *The Respondents both testified that they "voluntarily" consented to the adoption Petition because they felt that this was their only chance to maintain contact with Kayla.* emphasis added) There is no doubt in the mind of this Court that if the Adoption Petition were to be granted, regardless of the terms of the open adoption agreement, Sandra could never deny her brother, indeed the child she raised as a son, visitation with Kayla if he requested same. The Respondents were of the mind set that this was the "best deal" that they could make under all of the circumstances. The bonding between the two sisters, as well as the bonding which has been testified to between Kayla and

her foster parents, was part of the determining factors this Court considered in making its decision.

This Court is not unaware of the heartache this Decision will cause to the Respondent Father in particular, and to the aunt, Sandra, and to a lesser degree, to the Respondent Mother, but the best interest of Kayla is assured by granting the termination petition and denying the Petition for Adoption, which is what this Court has done.

Sandra has lived at least half her life. She has a full house with four relatives still residing with her, and it is the opinion of this Court that they will be there for some time to come. It is the opinion of this Court that the Respondent Mother will continue to think primarily of her own interests and that the Respondent Father is the one who will bear the burden of the loss.

This case has presented a series of ***"What If's"***.

What If the Respondent Mother had not given up her first child for adoption?

What If the Respondents had not been mildly mentally retarded?

What If Kayla had not been born exhibiting developmental delays?

What If the aunt, Sandra, had been available and accepted placement of Kayla when she was born?

What If Kayla had not been placed in the same foster home with her adopted half-sister and bonded with her and the foster parents?

What if? What if? What if?

The confluence of all of these "What If's" at the same time have influenced the life and future of one small child, named Kayla.

This Court is saddened by the effect its decision will undoubtedly have on the Respondent Father and his sister, Sandra, but it is consoled by the belief that it has done what it had to do to preserve Kayla's best interest.

This Court is of the opinion that hopefully its decision will result in a happy, full life, not only for Kayla, but also for her sister, Michelle – a future hopefully without so many "what if's".

An Order shall enter in accordance with this decision.

/s/ John A. Mutter
John A. Mutter
Associate Justice
Rhode Island Family Court

Dated: 1/22/03

APPENDIX C

The Americans with Disabilities Act:

42 U.S.C. § 12131:

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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42 U.S.C. § 12132:

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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42 U.S.C. § 12133:

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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42 U.S.C. § 12134:

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of

this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29. (c) Standards Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

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42 U.S.C. § 12201(a):

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

* * *

Section 504 of the Rehabilitation Act of 1973:

29 U.S.C. § 794:

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such

department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

Rhode Island's Termination of Parental Rights Statute

R.I. Gen. Laws § 15-7-7:

15-7-7. Termination of parental rights.

(a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any

subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:

(1) The parent has willfully neglected to provide proper care and maintenance for the child for a period of at least one year where financially able to do so. In determining whether the parent has willfully neglected to provide proper care and maintenance for the child, the court may disregard contributions to support which are of an infrequent and insubstantial nature; or

(2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:

(i) Institutionalization of the parent, including imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

(ii) Conduct toward any child of a cruel or abusive nature;

(iii) The child has been placed in the legal custody or care of the department for children, youth, and families and the parent has a chronic substance abuse problem and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. The fact that a parent has been unable to provide care for a child for a period of twelve (12) months due to substance abuse shall constitute prima facie evidence of a chronic substance abuse problem;

(iv) The child has been placed with the department for children, youth, and families and the court has previously involuntarily terminated

parental rights to another child of the parent and the parent continues to lack the ability or willingness to respond to services which would rehabilitate the parent and provided further that the court finds it is improbable that an additional period of services would result in reunification within a reasonable period of time considering the child's age and the need for a permanent home;

(v) The parent has subjected the child to aggravated circumstances, which circumstances shall be abandonment, torture, chronic abuse and sexual abuse;

(vi) The parent has committed murder or voluntary manslaughter on another of his or her children or has committed a felony assault resulting in serious bodily injury on that child or another of his or her children or has aided or abetted, attempted, conspired or solicited to commit such a murder or voluntary manslaughter; or

(vii) The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

(3) The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home; or

(4) The parent has abandoned or deserted the child. A lack of communication or contact with the child for at least a six (6) month period shall constitute prima facie evidence of abandonment or desertion. In the event that parents of an infant have had no contact or communication with the infant for a period of six (6) months the department shall file a petition pursuant to this section and the family court shall conduct expedited hearings on the petition.

(b) (1) In the event that the petition is filed pursuant to subdivisions (a)(1), (a)(2)(i), (a)(2)(iii), or (a)(2)(vii) of this section, the court shall find as a fact that, prior to the granting of the petition, such parental conduct or conditions must have occurred or existed notwithstanding the reasonable efforts which shall be made by the agency prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family. In the event that a petition is filed pursuant to subdivisions (a)(2)(ii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi) or (a)(4) of this section, the department has no obligation to engage in reasonable efforts to preserve and reunify a family.

(2) Any duty or obligation on the part of a licensed or governmental child placing agency to make reasonable efforts to strengthen the parental relationship shall cease upon the filing of a petition under this section. This provision shall not be construed and is not intended to limit or affect in any way the parents' right to see or visit with the child during the pendency of a petition under this section.

(3) Upon the filing of a termination of parental rights petition, the agency has an affirmative duty to identify, recruit, process and approve a qualified family for adoption or other permanent living arrangement for the child.

(c) (1) In considering the termination of rights as pursuant to subsection (a), the court shall give primary consideration to the physical, psychological, mental, and intellectual needs of the child insofar as that consideration is not inconsistent with other provisions of this chapter.

(2) The consideration shall include the following: If a child has been placed in foster family care, voluntarily or involuntarily, the court shall determine whether the child has been integrated into the foster family to the extent that the child's familial identity is with the foster family and whether the foster family is able and willing to permanently integrate the child into the foster family; provided, that in considering integrating into a foster family, the court should consider:

(i) The length of time child has lived in a stable, satisfactory environment and the desirability of maintaining that environment and continuity for the child; and

(ii) The reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference.

(d) If the court finds that the parental rights of the parent should be terminated as specified in subsection (a), it shall by decree duly entered, appoint some suitable person to give or withhold consent in any subsequent adoption proceedings. In the case of petitions filed by licensed or governmental child placement agencies, the court shall appoint the agency to be the sole party to give or withhold consent to the adoption of the child and further vest the agency with all rights of guardianship over the child.

(e) Nothing in this section shall be construed to prohibit the introduction of expert testimony with respect to any illness, medical or psychological condition, trauma, incompetency, addiction to drugs, or alcoholism of any parent who has exhibited behavior or conduct that is seriously detrimental to a child, to assist the court in evaluating the reason for the conduct or its probable duration.

(f) The record of the testimony of the parties adduced in any proceeding terminating parental rights to a child shall be entitled to the confidentiality provided for in § 8-10-21 and more specifically shall not be admissible in any civil, criminal, or other proceeding in any court against a person named a defendant or respondent for any purpose, except in subsequent proceedings involving the same child or proceedings involving the same respondent.

(g) In the event any child, the parental rights to whom have been finally terminated, has not been placed by the agency in the home of a person or persons with the intention of adopting the child within thirty (30) days from the date of the final termination decree, the family court shall review the status of the child and the agency shall file a report that documents the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, this documentation shall include child specific recruitment efforts, such as the use of state, regional and national adoption exchanges, including electronic exchange system.

(2)

No. 06-603

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES

On Petition For A Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF IN OPPOSITION

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INTRODUCTION

The Petitioners have presented no "compelling reasons" sufficient for this Court to grant their Petition for a Writ of Certiorari. *See Supreme Court* Rule 10. In this matter, the Rhode Island Supreme Court has not decided an important federal question in any way that conflicts with the decision of another state court of last resort, or of a United States court of appeals, or conflicts with any decision of this Court. *See Supreme Court* Rule 10(b) and (c).

The Petitioners urge this Court to grant their Petition based upon the fact that the Rhode Island Supreme Court has agreed with other high state courts in determining that a termination of parental rights proceeding is not the "sort of service, program, or activity that would be governed by the dictates of the ADA." *See* Pet. App. 11a. This decision, however, does not conflict with other state courts, nor does it conflict with any decision of this Court. The Petitioners also argue that this decision by the Rhode Island Supreme Court conflicts with this Court's decision in the *Yeskey* case. However, a review of the facts of *Yeskey* will reveal that the decisions are not in conflict and are distinguishable.

The Petitioners further argue that the issue of whether the ADA applies to termination proceedings, has confused the lower courts. A review of the lower court decisions will reveal that there is no confusion. Most lower courts have determined that the ADA does not apply to the actual termination proceedings. A few courts have indicated that a termination proceeding may be an activity falling within the meaning of the ADA. However, all of the state courts are consistent in concluding that the ADA already applies to the services offered to the parents prior

to the institution of the termination proceedings, and thus the ADA is not a defense to termination of parental rights proceedings. Moreover, the Petitioners fail to reveal to this Court that even in the lower court cases which indicate the ADA may apply to termination proceedings, the outcomes remain the same.

In essence, pursuant to the Adoption and Safe Families Act[1] and applicable state law, all the lower courts are obligated to review the delivery of services offered by the State to the family during the reunification process, notwithstanding whether the ADA applies to the actual termination of parental rights proceeding.

PROCEDURAL TRAVEL OF THE CASE

On January 10, 2002, the Department of Children, Youth and Families (hereinafter "DCYF") filed a termination of parental rights petition ("TPR") against Irving N. and Dawn N., the biological parents of Kayla N. Kayla was born April 13, 2000. The termination petition alleged that Kayla had been in the custody of DCYF for a period of at least twelve months; that the parents were offered and received services to rectify the situation which led to Kayla's placement, and that there was not a substantial probability that Kayla would be able to return safely to her parents' care within a reasonable period of time considering her age and need for a permanent home. *See R.I.G.L.* § 15-7-7(a)(3) at App. 33.

[1] *See* 42 U.S.C. § 671(a)(13); *see also* 42 U.S.C. § 675.

In April of 2002, while the TPR was pending, a paternal aunt, Sandra N. filed an Adoption Petition with the Family Court. The biological parents consented to Kayla's adoption by Sandra N. However, the child Kayla had already been living with her foster family and half-sister for two years at that point.

By order of the Rhode Island Supreme Court,[2] the adoption hearing was consolidated with the TPR trial. On January 22, 2003, the Rhode Island Family Court found by clear and convincing evidence that the parents were unable to safely and effectively parent their child and terminated their parental rights. App. 37-41. The Court denied the adoption petition filed by Sandra, as the child had been in the care of her current foster family in excess of two (2) years at that point and was very attached to her sister as well as to her foster parents. Pet. App. 54a.

An appeal was docketed in the Rhode Island Supreme Court on July 18, 2003 and the Rhode Island Supreme Court affirmed the decision of the trial court. In said decision the Rhode Island Supreme Court specifically noted the following:

> "If Kayla could thrive solely on her parents' love, the hearing justice's analysis of her best interests may have been different. In our view, however, that, far from undervaluing the parents' love in the instant case by resorting to an 'insensitive, mechanistic process,' the hearing justice, who aptly described the case as one involving 'a situation which is fraught with heartbreaking emotions,' painstakingly articulated his findings

[2] Order; Bourcier, J. 5/23/02, at App. 42.

> in a very comprehensive decision and reached a conclusion that we consider to be sustainable." Pet. App. 17a.

On October 30, 2006, the Petitioners filed the instant Petition for a Writ of Certiorari in this Court.

STATEMENT OF FACTS

The child, Kayla, came to the attention of the Rhode Island Department of Children, Youth and Families in April of 2000, upon her birth. The DCYF opened the case as to Kayla for several reasons. The mother, Dawn N., had prior involvement with the DCYF as to her first child, Michelle. Michelle was no longer in mother's custody when Kayla was born. The DCYF also received information that the maternal grandmother had threatened to kill the child Kayla, "and cook her and eat her." TR. 5/24/02 p. 22. DCYF believed that the child could not be placed at home due to what appeared to be "unsafe" conditions, coupled with the mother's "inability to care for her first child." Pet. App. 2a. At the Rhode Island Supreme Court, the Petitioners/parents argued that Kayla was wrongfully removed from their care at birth, however that issue was not properly before that court.[3]

[3] The Petitioners/Appellants argued that Kayla was initially wrongfully removed from her parents as she was "not in imminent danger," and the parents should have been able to take Kayla home from the hospital. A review of the Rhode Island Family Court record revealed that there was never an appeal of the Order of the Family Court removing the child from the parent's custody, nor was a Motion for Reunification ever filed. Yet, five years later, they argued that the child was erroneously removed from the parents' physical custody in

(Continued on following page)

Upon the birth of Kayla, the DCYF attempted to find a relative placement and inquired with the biological parents as to any relatives that could possibly care for Kayla. *TR.* I – 5/24/02 pp. 23, 24, 27. The DCYF considered Irving N's two recommendations of his niece, Cheryl Lopes, and his sister, Sandra N. The DCYF caseworker testified that she met with both of these relatives to determine if a relative placement was possible. She testified as follows:

> "Q. And what was their response?
>
> A. Miss Lopes had an active case at the time with the Department, so that precluded her from being a relative caretaker. And Mrs. (Sandra) N. said that she couldn't do it.
>
> Q. Did she indicate why she could not do it?
>
> A. At that time she said she wasn't prepared to care for a baby and that she felt that it would be good if we could place Kayla with her sister."

TR. I – 5/24/02 pp. 27, 28.

It must be noted that Sandra specifically expressed her inability to care for Kayla at that time. *TR.* I – 5/24/02 p. 27. On April 26, 2000, at the age of two weeks, Kayla was placed with her foster family, with whom she presently continues to live.

The first DCYF social worker assigned to this case was Tom Roberts. Mr. Roberts initially referred the parents to the Spurwink Program, which is designed for

---

April of 2000. The issue was not properly preserved for appeal before the Rhode Island Supreme Court.

parents and children with developmental delays or cognitive limitations. Spurwink provided parent-aide services and supervised visitation for the parents and Kayla. *TR.* I – 5/24/02 p. 27. The Spurwink Program provided specialized parent-aide services to the parents shortly after the birth of Kayla in April of 2000 until January of 2001. All involved agreed that the Spurwink Program provided services specifically tailored to meet the needs of cognitively limited parents.

DCYF caseworker, Ms. Okai, took over the case in September of 2000. The Spurwink records indicated that both parents clearly love their child, but even with services in place they were unable to "provide a safe, nurturing and stable environment that Kayla needs to thrive." *See Spurwink Records,* App. 6. The Spurwink program then terminated their services due to safety issues and concerns. App. 6.

Ms. Okai testified that Kayla had become very bonded with her foster parents and her half-sister, who had been adopted by this same foster family. Nevertheless, Ms. Okai made additional referrals to assist these parents with their parenting abilities, including a referral for a parent aide on December 5, 2000 and for parent education on January 18, 2001. *TR.* I – 5/24/02 pp. 70, 71. She made another referral for parent education at the St. Mary's program on February 12, 2001. Ms. Okai also made a referral for a Child Developmental Center (CDC) evaluation for Kayla on April 10, 2001 and the Family Learning Center on April 2, 2001. *TR.* I – 5/24/02 p. 71.

The plan for services as established by the DCYF, which included the above outlined services, was often reviewed by the Rhode Island Family Court. Of critical

importance is that Kayla was formally committed to the custody of the DCYF, on February 7, 2001, only ***after*** the agreed upon parenting services were in place. *TR.* I – 5/24/02 pp. 16, 17.

With regard to the parent education program at the St. Mary's Home for Children, Irving, refused to participate. Ms. Okai testified as follows:

> "A. Well, the parent education program was specifically for Irving because he stated that he would participate in an education class.
>
> Q. Did he in fact participate?
>
> A. No, he did not.
>
> Q. Why not?
>
> A. On January 19, 2001, I spoke with Irving and he stated to me that he had spoken to his attorney and she told him he didn't have to do it."

TR. I – 5/24/02 p. 72.

Included in the reasonable efforts made to reunify this family were referrals made on behalf of the child, Kayla. Referrals were made to an Early Intervention program and the Child Development Center at Rhode Island Hospital.

Petitioners make mention of the Rhode Island Family Court assigning a different social worker to this case as a result of an issue with the John Hope Settlement House program. *See Petitioner's Brief* 3 n.1. Ms. Okai reported that she received a progress report from John Hope after a hearing on March 22, 2001. The Court ordered DCYF to assign a new caseworker when the parent's Counsel argued that Ms. Okai should have delivered the letter to

the Court even though the hearing had already taken place. Ms. Okai further testified that the letter at issue was not prepared by the worker who actually had observed the visits between Kayla and the parents. She testified, "[M]y concern was that the person who was responsible for doing the visits should be the one who's telling us how the family is doing." *TR.* III – 6/3/02 p. 44.

Nevertheless, the case was transferred to DCYF caseworker Amy Waluk in April of 2001 and services continued. Early Intervention services began in May of 2001. Ms. Waluk testified that the referral for Early Intervention had already been made by the previous worker, Ms. Okai. *TR.* VI – 7/25/02 p. 7. An Early Intervention worker diagnosed Kayla with global developmental delays and provided the parents with various activities to perform with Kayla to improve her concentration and fine motor skills. Ms. Waluk testified that she observed that the parents did not follow the advice properly, and would simply watch Kayla rather than interact with her. Ms. Waluk testified that she made referrals to the VNA Healthy Tomorrows Program and Project Early Start. These programs were specifically put in place to assist the parents in dealing with Kayla's medical issues and developmental issues. *TR.* VI – 7/25/02 p. 7.

Ms. Waluk also made a referral to the Children's Friends and Services program. *TR.* VI – 7/25/02 p. 8. Referrals were made for the parents to engage in parent/child evaluations at the Providence Center[4] and also for

[4] The parents underwent a parent/child evaluation in July of 2001. Christine Trendell, a Licensed Clinical Social Worker, who conducted the evaluation, observed: "In conjunction with parents' observed tendency to misread Kayla's cues are their own unique ways of dealing

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psychological evaluations. The parents did comply with all evaluations and consistently met with the worker from Partners in Permanency. Ms. Waluk also made a referral for mother to attend the Sexual Assault and Trauma Center so that she could receive counseling for her own issues of sexual abuse victimization as a child. *TR.* VI – 7/25/02 p. 8.

Lisa Granda, who was qualified as an expert in clinical social work, worked with the parents at the Children's Friends and Services program. *TR.* III – 6/3/02 p. 68. Ms. Granda had weekly sessions with the family.

Ms. Granda further testified that the primary focus of her program "was to work on parenting skills, to collaborate with the other service providers who were involved who were working with Dawn and Irving, such as Early Intervention and VNA, and really identify what the areas were that Dawn and Irving needed to focus on." *TR.* III – 6/3/02 p. 77. In her report, Ms. Granda stated "To date, the N's have been unable to effectively parent Kayla without continued supervision and ongoing interventions and directions." In Ms. Granda's clinical opinion, the parents' lack of progress was due to "their inability to learn and understand the information that's being provided to them and being able to provide safe parenting for their daughter." *TR.* IV – 6/7/02 pp. 31, 32.

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with the stressors that a toddler presents. Father is observed as becoming anxious in response to Kayla's behaviors, while mother appears to become removed, focusing on concrete tasks, such as diapering. These responses to Kayla's cues could and did result in Kayla's needs not being met."

Dr. Steven Hirsch, a clinical psychologist, conducted psychological evaluations on the parents in September and October of 2001. Dawn and Irving's reading skills were at fifth and third grade levels, respectively. Dr. Hirsch stated, "Mrs. N. is an extremely immature and self-centered woman whose capacity for bonding with the young child (given her personality profile) is extremely limited." App. 14. Dr. Hirsch further opined within a reasonable degree of psychological certainty that Irving's "emotional and cognitive functioning indicates that he has difficulty adequately caring for himself let alone the special needs of a developmentally delayed 18-month-old." App. 21. As a result of his psychological evaluations, Dr. Hirsch recommended that parental rights be terminated.

Psychiatric evaluations were also conducted on the parents. They were performed by Dr. David Savitsky in October of 2001. App. 22. He reported that Dawn was unable to describe Kayla's development or list any of her likes and dislikes. When asked to name the five most important people in his life, Irving did not mention either his wife or his daughter. Dr. Savitsky reported that Irving would not be able to provide Kayla with a "level of consistency and empathic response" that is required in light of her developmental delays. Dr. Savitsky noted that while Dawn may be able to learn limited parenting skills, her "lack of empathy and inability to use language truthfully and in flexible approaches to meeting her own needs, are likely to grossly impair her ability to effectively parent her daughter." App. 29.

Testimony on the Adoption Petition, filed by Sandra N., was taken prior to the Family Court's decision regarding the termination of Dawn and Irving's parental rights. Both parents testified that they wanted the aunt, Sandra

N., to adopt Kayla. Irving testified that he wished to maintain contact with Kayla and that adoption by Sandra was in Kayla's best interests. Upon further examination, Irving was unable to articulate why this was in Kayla's best interests. The only reason he was able to give was, "So I can see her once a month." *TR.* XI – 11/13/02 p. 10. When asked if he, on his own, or with his wife, could take care of Kayla, Irving stated "no." *TR.* XI – 11/13/02 pp. 10, 11. Dawn, however, testified that she believed that she and her husband could care for Kayla with help.

Sandra N. testified that after she began supervising visits between her brother, his wife and Kayla, she began to have doubts regarding his ability to care for the child. She stated:

> Q. Do you think your brother and his wife could take care of Kayla?
>
> A. "Not by themselves, no." *TR.* XI – 11/13/02 p. 34.

The foster father testified that should he ever adopt Kayla and she expressed an interest in seeing her biological parents, he would not object to that. The foster mother testified to the activities that she and her husband do with Kayla to develop her speech skills. She also described the closeness between Kayla and Kayla's half-sister, Michelle. Kayla remains in this same foster home where she has lived since April of 2000 and she is thriving in this home.

After hearing all the evidence, the Rhode Island Family Court ultimately determined that the parents could not safely parent Kayla and that it was in the best interests of Kayla to terminate the parental rights of the biological parents, so that Kayla could be adopted by the family who had cared for her in excess of two years.

Kayla's adoption has been held in abeyance since the filing of the instant Petition.

LEGAL ARGUMENT

REASONS TO DENY PETITION

A. The Decision of the Rhode Island Supreme Court Does Not Conflict With the ADA Nor With This Court's Decision in the *Yeskey* Case.

The Americans with Disabilities Act (hereinafter "ADA") provides that "[S]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *See* 42 U.S.C.S. § 12132.

In the case of *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Petitioner/Department of Corrections sought review of an Order of the United States Court of Appeals for the Third Circuit, which reversed the trial court's ruling that the ADA was inapplicable to inmates in state prisons. The specific question before this Court was whether Title II of the Americans with Disabilities Act (ADA), which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that individual's disability, covers inmates in state prisons. In that case Mr. Yeskey was an inmate, sentenced to serve up to 36 months in a Pennsylvania prison. The sentencing court recommended that he be placed in a state Motivational Boot Camp for first-time offenders, the successful completion of which would have led to his release on parole in only six months.

See Yeskey, 524 U.S. 206, at 208. Because of Mr. Yeskey's disability, however, he was refused admission. He filed suit against the Commonwealth of Pennsylvania's Department of Corrections and several department officials, alleging that his exclusion from the Boot Camp violated the ADA.

In *Yeskey*, the Petitioners argued that state prisons were not covered by the ADA, due to the clear intent not to alter "the usual constitutional balance between the States and the Federal Government." Thus, arguing that the ADA must be interpreted to maintain the substantial sovereign power of the States to control and manage their state prisons. *See Yeskey*, 524 U.S. 206, at 209. The Petitioners argued that the exercising of control over state prisons is a traditional and essential state function necessary for the preservation of societal order. *Id.* Nevertheless, this Court concluded that state prisons "fall squarely within the statutory definition of 'public entity' which includes 'any department, agency, special purpose district, or other instrumentality of a State or local government.'" *Id.* at 210. In holding that the ADA extends to state prisons and their inmates, this Court stated that there existed no basis to distinguish the activities and services provided to prisoners as provided to other individuals, thus remanding the case for hearing on Mr. Yeskey's ADA discrimination claim, due to his exclusion from the state prison program.

In the matter at hand, the Petitioners rely heavily on the *Yeskey* case in arguing that the ADA applies to termination of parental rights proceedings, such reliance however is mistaken. In *Yeskey*, the petitioner was specifically *denied participation* in the Motivational Boot Camp prison *program*. The Pennsylvania state prison refused to allow Mr. Yeskey to participate in this program solely due to his medical disability. *Id.* at 208. The *Yeskey* case is not

on point to the within case, because neither Irving, nor Dawn were denied any services by the Rhode Island Department of Children, Youth, and Families. The Petitioners have not identified one service, program, or activity that they were denied the opportunity in which to participate.

Though the Department of Children, Youth, and Families (DCYF) itself falls squarely within the statutory definition of a public entity which specifically includes "departments" and "agencies," the actual termination of parental rights proceeding itself does not. *See* 42 U.S.C. § 12131(1)(c). The Petitioners have not claimed that DCYF prohibited them from participating in any activity, service, or program. Thus, the *Yeskey* case is not applicable to facts of the matter at hand. And, moreover, the Rhode Island Supreme Court's decision that the ADA does not apply directly to a termination of parental rights proceeding does not conflict with this Court's decision in *Yeskey*.

B. The Americans with Disabilities Act ("ADA") is Not Directly Applicable to Termination of Parental Rights Proceedings.

In order for the Americans with Disabilities Act to be violated one must be "excluded from participation" or be "denied the benefits of the services, programs, or activities of a public entity, . . . " *See* 42 U.S.C. § 12132. With respect to the actual termination of parental rights proceeding, the Petitioner/parents were not excluded from or denied the ability to fully participate in the termination proceeding. The Petitioners have not even argued that they were denied the ability to participate in the actual termination of parental rights court proceeding. The case of *Tennessee v. Lane*, illustrates what is defined as a violation of the

ADA. *See Tennessee v. Lane, et al.*, 541 U.S. 509 (2004). In said case, Mr. Lane was a paraplegic confined to a wheelchair who claimed that he had been denied access to the courthouse, because the courthouse was not wheelchair accessible nor did it have an elevator. *Id.* at 513. This Court concluded that Title II of the ADA was applicable to the matter since the petitioner had been denied his right of access to the courts. *Id.* at 533. This Court went on to provide a history of the type of situations that Title II of the ADA was intended to remedy.[5]

The type of harm the ADA was intended to remedy is not found in the matter at hand, as neither Irving, nor

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[5] "It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual capacity." n5 The majority of these laws remain on the books, n6 and have been the subject of legal challenge as recently as 2001. n7 Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying n8 and serving as jurors. n9 The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled **[*525]** persons by state agencies in a variety of settings, including unjustified commitment, *e.g., Jackson v. Indiana*, 406 U.S. 715, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982); n10 and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, n11 public education, n12 and voting. n13 Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice. n14"

Dawn were denied the ability to participate in any service, program or activity provided by DCYF.

Most state courts are in agreement that the ADA simply does not apply directly to termination of parental rights proceedings. The high court of the State of Massachusetts considered this issue in the case of *In re Adoption of Gregory*, 747 N.E.2d 120 (MA 2001). The father in that case claimed that the trial judge erred in terminating his parental rights because the Department failed to accommodate his disabilities in its services. *Id.* at 123.

The father specifically argued the following:

> " . . . the judge erred in terminating his parental rights, under G. L. c. 210, § 3, because the department failed reasonably to accommodate his cognitive disorder and attention deficit hyperactivity disorder (ADHD) by providing services designed for these disabilities, in violation of Title II of the ADA, 42 U.S.C. § 12132, . . . " *In re Adoption of Gregory*, 747 N.E.2d, at 124.

The Supreme Judicial Court of Massachusetts concluded that the ADA does not apply to termination proceedings and reasoned as follows:

> "As discussed below, we conclude that: (1) proceedings to terminate parental rights under G.L. c. 210, § 3, do not qualify as "services, programs, or activities" under the ADA, and thus, the ADA may not be raised as a defense to such proceedings; and (2) the ADA, as well as Massachusetts antidiscrimination laws, regulations, and its Constitution require the Department to render services that accommodate the parents' special needs prior to G. L. c. 210, § 3, proceedings, which it did in this case.

. . .

> In our view, the parents' rights are secondary to the child's best interests and thus, the proper focus of termination proceedings is the welfare of the child. G. L. c. 210, § 3. *People ex rel. T.B.*, 12 P.3d 1221, 1223 (Colo. Ct. App. 2000). *See* Petition of the Dep't of Social Servs. to Dispense with *Consent to Adoption*, 391 Mass. 113, 118-119, 461 N.E.2d 186 (1984). Despite the parents' special needs or limited capabilities, "the child is entitled to at least a minimum level of parental care." *People ex rel. T.B., supra* at 1224." *In re Adoption of Gregory*, 747 N.E.2d, at 124.

The Massachusetts court went on to state that notwithstanding whether the ADA applied, "the department reasonably accommodated the father's disabilities. As the judge found, the department provided ample services, specifically tailored to meet the father's special needs and designed to improve his parenting skills." *In re Adoption of Gregory*, 747 N.E.2d, at 124.

Significantly, the court also stated that "a parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made." *Id.* at 127. Raising such a claim at the termination proceeding, when a child has already been in state foster care for several years, is not timely,[6] and that is exactly what the Petitioners have done in the within matter.

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[6] "Finally, we note that a parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made. If a parent believes that the department is not reasonably accommodating a disability, the parent should claim a violation of his rights under either the ADA or other antidiscrimination legislation,

(Continued on following page)

Numerous other state courts have also held that the ADA is not applicable in termination of parental rights proceedings. In the case of *In re Anthony B.*, 735 A.2d 893 (CT. 1999), the Appellate Court of Connecticut concluded that the ADA neither provides a defense to, nor creates special obligations in a termination proceeding. *Id.* at 899. The Connecticut Court further concluded that "a termination proceeding is not a 'service, program, or activity' under the ADA. *Id.*

The Court of Appeals in Louisiana has also addressed this issue. In the case of *State ex rel., B.K.F.*, 704 So.2d 314 (La. Ct. App. 1997), the Louisiana Court stated the following:

> "In this case, C.F. alleges that the Americans with Disabilities Act applies to this termination of parental rights proceeding. The trial court found that the Americans with Disabilities Act was *not* applicable to these proceedings, and even if it were to apply, OCS (Office of Children's Services) has made reasonable modifications for C.F. The trial court, therefore, *denied*

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either when the parenting plan is adopted, when he receives those services, or shortly thereafter. At that point, the court or the department may address the parent's claim. However, where, as here, a disabled parent fails to make a timely claim that the department is providing inadequate services for his needs, he may not raise noncompliance with the ADA or other antidiscrimination laws for the first time at a termination proceeding. Here, the father had two possible options to remedy his complaint of inadequate services. He could have pursued his claim that the service plan and other department services failed to address his disabilities through an administrative fair hearing or grievance process. See 110 Code Mass. Regs. §§ 6.07, 10.05, 10.06, 10.37, 10.39 (1998). n2 Alternatively, he could have commenced a separate action for discrimination under the ADA. He did neither." *See In re Adoption of Gregory*, 747 N.E.2d 120, 127.

> appellant's motion to dismiss for failure to comply with the ADA.
>
> . . .
>
> In this proceeding, appellant has alleged that OCS has failed to make appropriate modifications in its policy, practice or procedure to avoid discrimination against her on the basis of her disability. However, termination of parental rights proceedings are not "services, programs or activities" within the meaning of the ADA. Accordingly, we hold that the ADA may *not* be used as a *defense* in a *parental rights termination* case.
>
> While this appears to be a case of *first impression* in our jurisdiction, we note that *other courts* have *also concluded* that a parent may *not* raise violations of the ADA as a defense to termination of parental rights proceedings. *Stone v. Daviess County Div. Of Children & Family Services*, 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re Torrance*, 187 Wis. 2d 10, 522 N.W.2d 243 App. 1994." *State ex rel., B.K.F.*, 704 So.2d 314, at 317.

The Supreme Court of the State of Vermont has also addressed the issue of whether the ADA applies to termination of parental rights proceedings. In the case of *In re B.S., Juvenile*, 693 A.2d 716 (Vt. 1997), the court said:

> "The mother's second claim of error is that the court improperly terminated her parental rights without addressing her claims under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134. She relies on the fact that she is mentally retarded and mental retardation is a disability within the meaning of the

> ADA. See 42 U.S.C. § 12102(2) (defining "disability"); 28 C.F.R. § 35.104(1)(ii) (mental retardation is a disability); *Howard v. Department of Social Welfare*, 163 Vt. 109, 115 n.1, 655 A.2d 1102, 1106 n.1 (1994) (learning disability is impairment under ADA). She argues that, with help, she has the capacity to care for her child and is therefore a qualified person eligible for accommodation under the ADA. See 42 U.S.C. § 12131(2) (defining "qualified individual with a disability"). She claims that SRS has failed to accommodate her disability and, as a result, has discriminated against her in the provision of the services needed to parent her child." *In re B.S., Juvenile*, 693 A.2d 716, at 719.

The Vermont Court went on to conclude that the ADA did not apply to TPR proceedings. *Id.* at 720. "TPR proceedings are not 'services, programs or activities' within the meaning of Title II of the ADA, 42 U.S.C. § 12132." "Thus, the anti-discrimination requirement does not directly apply to TPR proceedings." *Id.* at 720. Other states which have adopted this reasoning include Indiana, Wisconsin, and Michigan. *See Stone v. Daviess County Div. of Children & Family Services,* 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re Torrance P.,* 522 N.W.2d 243 (Wis. Ct. App. 1994); *In re Terry*, 610 N.W.2d 563 (Mich. App. 2000).

Similarly, the Rhode Island DCYF proffers that the decision of the Rhode Island Supreme Court that, the ADA does not apply to TPR proceedings, is consistent with the decisions of other high state courts and does not conflict with any decision of this Court.

C. The Americans with Disabilities Act Does Not Provide a Defense to Termination of Parental Rights Proceedings.

It is undisputed that the state courts have taken differing positions regarding whether and how Title II of the ADA applies to termination of parental rights proceedings. Clearly, however, all parties agree that we are unable to find a decision holding that the state violated the ADA in a termination of parental rights proceeding. *See Petitioner's Brief* 13. What this reflects is that notwithstanding whether a lower court holds that the ADA applies to termination proceedings, the state agency has a separate and distinct duty to provide reasonable efforts to reunify a parent and child in certain situations.[7] The states that have addressed this issue decline to allow the ADA to be used as a defense in termination proceedings because the reasonableness of the services offered to parents is specifically addressed in the state reunification statutes. *See* R.I.G.L. § 15-7-7(b).[8]

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[7] In cases where a termination proceeding is based upon a parent abandoning an infant child or upon a parent exhibiting cruel and abusive behavior toward a child, the state is NOT obligated to make any efforts to reunify that child with the abusive parent. *See* R.IG.L. § 15-7-7(a)(2)(ii) and § 15-7-7(a)(4).

[8] R.I.G.L. § 15-7-7(b) "In the event that the petition is filed pursuant to subdivisions (a)(1), (a)(2)(i), (a)(2)(iii), or (a)(2)(vii) of this section, the court shall find as a fact that, prior to the granting of the petition, such parental conduct or conditions must have occurred or existed notwithstanding the *reasonable efforts which shall be made by the agency prior to the filing of the petition* to encourage and strengthen the parental relationship so that the child can safely return to the family. In the event that a petition is filed pursuant to subdivisions (a)(2)(ii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi) or (a)(4) of this section, the department has *no obligation to engage in reasonable efforts* to preserve and reunify a family." (Emphasis added).

In the case of *In re Terry*, the state court of Michigan held that a parent "may not raise a violation of the ADA as a defense to termination proceedings. *See In re Terry*, 610 N.W.2d 563 (Mich. App. 2000). The Michigan court went on to state:

> "We agree that termination of parental rights proceedings do not constitute "services, programs or activities" within the meaning of 42 USC 12132. Accordingly, we hold that a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings. Nevertheless, the ADA does require a public agency, such as the Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the FIA must comply with the ADA. n4 However, in the context of the present case, we discern no conflict between the ADA and Michigan's Juvenile Code. Under MCL 712A.18f(4); MSA 27.3178 (598.18f)(4), before entering an order of disposition, the court must determine whether the FIA has made "reasonable efforts" to rectify the conditions that led to its involvement in the case. Thus, the state legislative requirement that the FIA make reasonable efforts to reunite a family is consistent with the ADA's directive that disabilities be reasonably accommodated. In other words, if the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family. n4 Services are not mandated in all situations, but MCL 712A.18f(1)(b); MSA 27.3178 (598.18f)(1)(b) requires petitioner to

> justify a decision not to provide services to a particular family." *Id.* at 570.

In re Terry provides an excellent clarification of how the ADA does not provide a defense to the court proceeding itself, but is consistent with the state legislative requirements that the agency make reasonable efforts to reunify the parent and child before the family court can terminate parental rights. *See In re Terry*, 610 N.W.2d 563, 570 (Mich. App. 2000).

The Michigan court then joined in the reasoning of the Massachusetts high court in the timing issue of raising ADA violations.

> "Any claim that the FIA is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA." *In re Terry*, 610 N.W.2d 563, at 570; *see also In re Adoption of Gregory*, 747 N.E.2d, at 124.

The Rhode Island court followed in the reasoning of the above-mentioned courts when it determined that the ADA does not directly apply to termination proceedings

and even if it did, the Petitioners were offered reasonable services to reunify with their child.

D. The Few Courts That Have Stated That a Termination of Parental Rights Proceedings is an Activity Within the Meaning of the ADA Have Either Been Overturned or Have Found No Violation of the Act.

In the case of *In the Interest of Jane Doe*, the State of Hawaii did state that a TPR proceeding is a "program or activity" of the family court, falling within the meaning of the ADA, however ultimately concluded that "the ADA does not allow parents to defend a TPR proceeding on the basis that they were not provided with appropriate services to accommodate their disabilities." *In the Interest of Jane Doe,* 58 P.3d 78, 88-89 (Haw. App. 2002). This decision, however, that a TPR proceeding is a "program or activity" of the family court, falling within the meaning of the ADA, was specifically overruled in the case of *In the Interest of Doe*, 60 P.3d 285 (Haw. 2002). In the *Doe* case, the Hawaii court stated the following:

> "In *In re Interest of Jane Doe*, 58 P.3d 78, (Haw. App. 2002), the Intermediate Court of Appeals (ICA) held that a termination of parental rights proceeding (termination proceeding) is a "program" or "activity" covered under the ADA. Applying the ADA, the ICA addressed the merits of the parents' claim. As we hold here, such claims cannot be raised in a termination proceeding as a defense. . . . The merits are outside the purview of the family court in a termination proceeding, and thus In re Jane Doe, except for its affirmance of the family court's orders, must be overruled." *Id.* at 292.

In *Doe*, the court held "that a parent's allegations of a violation of the Americans with Disability Act (ADA), 42

U.S.C. §§ 12131 through 12134, do not raise a defense in a proceeding to terminate parental rights under Hawai'i Revised Statute (HRS) § 587-73 (1993). However, Department of Human Services-Appellee (DHS) should provide "every reasonable opportunity" to a parent to succeed in reuniting a family, . . . , particularly in establishing the steps necessary to reunite the family in the form of a service plan." *Id.* at 287.

Like the parents in the *Doe* case, the Petitioners here should also have been provided with every "reasonable opportunity" or "reasonable effort" to reunify with Kayla, and they were. Petitioners do not claim that they were excluded from or denied participation in any particular activity or service. As such, their claim of an ADA violation may not be used as a defense in a termination of parental rights proceeding. The Petitioners do claim, however, that the services they did receive were not sufficiently tailored to their disabilities. *See Petitioner's Brief* 8. This is a separate and distinct factual question that must be decided on a case-by-case basis and does not in and of itself constitute a violation of the ADA.

A termination of parental rights proceeding is a very emotional and factually driven case. Whether a parent is addicted to illegal substances, is cognitively limited, or is abusive to their child; they must still be offered *reasonable* services to correct the situation which led to the child's removal from the home. If the state court determines that the services were not reasonable, the termination of parental rights petition must be denied. Conversely, if the court determines the services were reasonable and that the child's best interests will be served, the petition must be granted. Thus, to argue whether or not the ADA applies to the actual court proceeding is a red herring when one considers the analysis performed by the Family Courts.

Rhode Island General Law mandates that "the court shall find as a fact that, prior to the granting of the petition, such parental conduct or conditions must have occurred or existed notwithstanding the **reasonable efforts** which shall be made by the agency prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family." *See* R.I.G.L. § 15-7-7(b) (emphasis added). Thus, pursuant to state law, the Rhode Island Family Court is required to make a finding that the DCYF made reasonable efforts to strengthen the parental relationship so that the child could be safely reunified.

The Rhode Island Family Court consistently considers the reasonableness of the services offered to reunify families, especially in families where the parents are cognitively limited. *See In re Kayla F. and Brittany R.*, 692 A.2d 698 (R.I. 1997) (Court considered the reasonable efforts DCYF made to assist mother who had limited cognitive abilities.); *In re Raymond C., et al.*, 864 A.2d 629 (R.I. 2005) (Record discloses mother's mental illness was the primary barrier to reunification; mother received reasonable services through mental health counseling that were numerous and comprehensive.); *In re Jennifer G.*, 767 A.2d 682 (R.I. 2001) (Court found that DCYF offered the mother reasonable services, including psychotherapy, a psychiatric evaluation, and the Spurwink program, where mother had mental health disorder.)

In the hand, there are times when the Rhode Island court determines that DCYF did not make reasonable efforts to address a parent's cognitive or mental health deficiencies. *See In re Christopher B.*, 823 A.2d 301 (R.I. 2003). In the *Christopher B.* case, the Rhode Island Court held that DCYF did not make reasonable efforts to address the mother's limited cognitive abilities and improve her

parenting skills. The mother in that case, like the Petitioners, was diagnosed as mildly mentally retarded. Though her evaluators conceded that specialized services may not be sufficient to allow for reunification to occur, they still recommended that the services be received to more fully determine her parenting abilities. The Rhode Island DCYF, however, did not make the proper referrals for services. The court stated:

> "Significantly, DCYF failed to abide by these recommendations. Thus, it made no additional referrals for Mary Ann other than for marriage counseling; it offered her no services aimed at specialized parenting education over the next year – other than her continued participation in the supervised visitation program at the Children's Museum. n3 In addition, although advised of Mary Ann's cognitive impairment and that its presence was a barrier to reunification, DCYF took no steps to provide Mary Ann with any form of specialized services [*7] aimed at addressing this problem." *See In re Christopher B.*, 823 A.2d at 304 (R.I. 2001).

Unlike the parent in the *Christopher B.* case, the Petitioners were offered specialized parenting services throughout the year 2000 from the Spurwink program. Dawn had also received Spurwink services from 1998 to the end of 1999 with her first child Michelle. Beginning in early 2001, Early Intervention Services were put in place to work with the parents and the child. DCYF also offered services from the VNA Healthy Tomorrows Program and Project Early Start. These programs were specifically put in place to assist the parents in dealing with Kayla's medical issues and developmental issues. *TR.* VI – 7/25/02 p. 7. DCYF also made a referral to the Partners in Permanency Program at Children's Friends and Services, which

did provide services. *TR.* VI – 7/25/02 p. 8. DCYF further provided the Appellants with a parent/child evaluation at the Providence Center, psychological evaluations, and psychiatric evaluations. The Appellant/mother was also provided counseling through the Sexual Assault and Trauma Center so that mother could receive counseling for her own issues of sexual abuse victimization as a child. *TR.* VI – 7/25/02 p. 8. Additionally, DCYF referred the parents to St. Mary's Home for Children for specialized parent education. The Petitioner father, however, refused to participate in this parent education program. *TR.* I – 5/24/02 pp. 72, 74.

So, unlike in the *Christopher B.* case, the Petitioners were offered services specifically tailored to their special needs and as such the Americans with Disabilities Act was not violated, even if it did apply to termination of parental rights proceedings.

E. The Rhode Island State Court Did Not Violate the ADA by Failing to Consider Permitting *Sandra N.* to Adopt Kayla.

Lastly, the Petitioners argue that "the state court failed to consider whether permitting Sandra N. to adopt Kayla would be a proper "reasonable modification." *See Petitioner's Brief* 8. This is incorrect for several reasons. First, this is entirely a factual issue since the Rhode Island Family did consider whether to allow Sandra N. to adopt Kayla. The Rhode Island Family Court took testimony specifically on the adoption petition filed by Sandra N. The Family Court gave significant weight to the fact that Sandra was asked to care for Kayla shortly after her birth in April of 2000, yet Sandra was unable to care for her. It was not until two years later that Sandra indicated she could care for Kayla. By that point Kayla had become

very attached to her foster family and her sibling that she had lived with for those two years.

Not only did the Rhode Island state court consider Sandra N.'s adoption petition but it also considered the best interests of the child in denying said petition.

CONCLUSION

This case is a most difficult case in that the unfitness of the parents comes from their inability to learn how to safely parent Kayla largely as a result of their cognitive limitations and not as a result of their intentional abuse or neglect of this child. However, we must consider the effect that prolonging this litigation will have upon Kayla. *See Castorr, et al. v. Brundage, et al.*, 459 U.S. 928, at 930 (1982). ("the importance of finality is compelling." " . . . prolongation of this litigation might have a serious adverse effect on the emotional and physical health of the child.").

The best interests of Kayla mandate that she be freed for adoption and allowed to be adopted by the family that has cared for her for so long.

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

DEPARTMENT OF CHILDREN,
YOUTH AND FAMILIES

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Providence, RI 02903
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No. 06-603

In The

Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES

On Petition For A Writ Of Certiorari To The Supreme Court Of Rhode Island

APPENDIX TO THE BRIEF IN OPPOSITION

APPENDIX

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APPENDIX A

Spurwink [LOGO]
Administrative Office
One Spurwink Place
Cranston, RI 02910-2012
Phone 401-781-4380
Fax 401-781-4396
Community Support Program
One Spurwink Place
Cranston, RI 02910-2012
Phone 401-781-4380
Fax 401-467-3261

FAMILY SUPPORT DISCHARGE SUMMARY

FAMILY NAME: Dawn and Irving Nardolillo
FSW: Elsbeth Horton
FUNDING: 005
DCYF WORKER: Gail Okai
DATE: January 10, 2001

Reason for Referral: This case was opened to DCYF on 2/18/98, following the birth of Michelle Major. Dawn Major, the child's mother was found to be emotionally unstable, living in several places throughout her pregnancy, at one point being homeless, and was suspected of starting fires. A 72-hour hold was placed on Michelle. It was then learned that Dawn was living with her mother, who has an extensive history with DCYF, including allegations of sexual molestation as to Dawn. Dawn gave birth to her second child, Kayla Nardolillo on April 13, 2000. Visits now co Irving Nardolillo, Kayla's father also participates in these visits. On September 28, 2000 Michelle was adopted by her foster family. Spurwink services began in November of 1998, and continued until October 25, 1999. Services were put into place again in December 1999, with

a change of workers in January of 2000, and continued until December 2001. Services were limited to supervised visits at DCYF for two hours once a week. This report contains data from 11/14/00 to 12/29/00, as prior data has been included in previous reports to DCYF.

Goal 1: Exposing Kayla to language.

This worker continually models this concept for Dawn and Irving. Dawn continues to struggle with understanding Kayla at her developmental level. For example, on December 8th, Dawn was struggling to try a Christmas outfit on Kayla. She was having a hard time putting Kayla's arms into it. She said to Kayla, "come on." Worker had to explain to Dawn that Kayla does not yet have a concept of how to dress. Later that same visit, Dawn was attempting to change Kayla's diaper. Dawn said to her, "come Kayla, lift up, and "well, excuse me! I have to change your diaper!!"

Goal 2: Interacting with Kayla.

Dawn continues to need prompting in this area. Worker continues to model proper interaction. Dawn also needs prompting to spend quality time with her daughter, as she only sees her for two hours a week. Although the time that Dawn will hold and interact with her child has increased lately, she will do so while commenting on "what the judge said." For example on 12/8, Dawn was sitting on the floor with Kayla, playing. She began to complain about getting old. Irving told her to sit in the chair. She replied, "no! You heard what the judge said! I want her home!"

Dawn and Irving have both made several comments about "how much Kayla likes Elsbeth." Neither Dawn nor Irving

seems to be able to grasp the concept of continued interaction with their child. Although they do interact with her some during a visit, they both need prompts to continue this task, or to change the way they go about it. For example, on November 17th, this worker began to talk with Kayla, who in turn, smiled. Irving said, "I don't know why she likes Elsbeth so much!" Worker explained that it was due to the fact that I was being silly, and babies love that. On December 8th, Dawn handed the baby to me after Kayla began to fuss. Worker has continually talked with Dawn and Irving about distracting Kayla during diaper changes. Dawn will now tell Irving to get a rattle to stop her from crying.

Goal Three: To provide basic child care skills.

Both Dawn and Irving are capable of changing Kayla's diaper. This task is completed at least twice during every visit by Dawn or Irving. This worker had in the past expressed some concern that Kayla would never take a full bottle while at a visit. It has since been found that Kayla had a birth defect that caused fluid to go into her ear canal each time she swallowed, which caused her great pain. She also experienced pain while laying flat, which explained her lack of sleep. She was operated on in December to correct this problem.

When Dawn and Irving where told of their daughters problem, Dawn used this as an reason to not change her diaper. On 12/8, she stated that Kayla needed a diaper change, but did not want to lay her flat and cause her pain. Worker had to tell her to be quick.

This worker has also had to intervene when Dawn and Irving where attempting to get her dressed, and other clothing issues. For example, in November, Dawn bought Kayla a snow suit, which was for a very small infant. The size on the tag said 12 months. Worker explained to Dawn that while it may fit Kayla now, it would not continue to fit her long. Dawn could not understand why. Worker had Dawn dress the baby in it to explain it better. Dawn then took the snow suit back, and exchanged it for exactly the same one, only in a different color, same size.

On 12/8, Dawn brought Kayla's Christmas dress to try on her. While she was changing Kayla's diaper, worker suggested that they try the dress on, as she was already half undressed. Both Dawn and Irving took part in this venture. Neither could get the dress on her all the way. They where successful getting it over her head, but could not button it. They then attempted to put her other outfit back on her, but could not remember which way the outfit went or how to snap it up. Worker finally intervened after about five minutes of them arguing how to snap it up. Since Kayla's surgery, she has been doing much better sleeping and eating. However, Dawn still finds it difficult to understand and complete the task of feeding her. On 12/29, Dawn was told the baby needed to eat at 10:30. However, Kayla was not feeling well, and slept throughout most of the visit. Dawn kept asking what she should do about feeding her, and both Dawn and Irving became nervous when 10:30 drew near. Worker told her to wait and see if she was still asleep at 10:30. At about 10:15, Dawn stated, "I don't know what do about her eating. I should have asked Lisa (who was covering for Gail) what I should do if she was asleep. I hate to wake her." Worker told Dawn that this was a decision that she had to make

as Kayla's mother. When 10:30 came, Dawn wanted to feed her. Irving told her to leave her alone, because if she woke up, she would be cranky. Dawn said, "I have to feed her. If I was home with her, I would feed her. I am not going to let her starve. I need to keep her on schedule.' She then woke the baby up, and she drank the whole bottle and fell back to sleep. Although, in this worker's opinion neither decision Dawn made would have been wrong, it is concerning the lack of understanding Dawn showed in this decision.

Goal 4: Providing Kayla with Safety.

This goal still seems to be a major issue with the Nardolillo family. Although Dawn attempted to not have a relationship with her mother, her mother still is a major part of her fife. Rose Major, according to Dawn, fell ill in December and now needs constant care for her basic needs. Dawn has stated to this worker that she has "a big decision to make" regarding her mother's care, this being whether to let her return home, or be placed in a nursing home.

Dawn still talks of the people who play an influential role in her life, and the unsafe situations this has caused. Dawn, during one visit talked of her mother's friend stealing her pain killers, and giving her mom the wrong medication, which according to Dawn has caused her mother's illness. Dawn still seems to lack the understanding of how this could affect her daughter's life.

Dawn continues to spend a lot of time trying to manipulate the rules of her daughter's visit. Dawn and Irving have both been given permission to take one picture each during visits, bringing the total to 2 pictures. On 12/7/00, this worker received a message from Dawn stating "I

talked to Brenda and she said that we could take six pictures today. Two for the visit when Kayla was in New York, two for last week because of court, and two for today. I will take seven, to give you an updated one of Kayla." Worker checked with her supervisor, Beth Ingram, who checked with Brenda Almeida. Brenda stated that she never gave Dawn permission to take that many pictures. When FSW confronted Dawn on this, Dawn tried to argue with Tom Roberts (who was covering for Gail), and myself, "but she said, . . . I asked Gail. . . . ". Tom told Dawn, "Dawn you know the routine! One picture." This situation shows again how Dawn will take a situation and twist it to meet her own needs.

REASON FOR DISCHARGE: At the last court session, held in November, home visits where ordered for this family. Given the safety issues and concerns these visits would provide, Spurwink will not carry out these visits. As a result, the last visit was on December 29, 2000.

RECOMMENDATIONS: Although both Dawn and Irving have the ability to change their daughter's diaper and provide minimal stimulation and basic care, this agency has serious concerns for the well being of Kayla. Dawn has not, in the years that service has been provided shown the ability to put her children's needs above that of her own. Although Dawn may love her child, she has not proven to be able to provide a safe, nurturing and stable environment in which Kayla needs to thrive. All aspects of this case should be carefully examined to determine how to best meet Kayla's needs.

/s/ Elsbeth A. Horton
Elsbeth A. Horton
Family Support Worker

/s/ Bethany Ingram
Bethany Ingram, LSCW
Social Work Supervisor

CC: Brenda Almeida
Nancy Harrington

APPENDIX B

STEVEN S. HIRSCH, PH.D., A.B.P.P.
1 RICHMOND SQUARE
SUITE 104C
PROVIDENCE, RI 02906

PSYCHOLOGICAL EVALUATION

PATIENT'S NAME: Nardolillo, Dawn
TESTS TESTED: 9-28, 10-10-01
PATIENT'S DATE OF BIRTH: 9-15-72
CHRONOLOGICAL AGE: 29-0

REASON FOR THE REFERRAL: Mrs. Nardolillo, age 29-0, was referred for a Psychological Evaluation of her cognitive and emotional functioning due to a history of physical, emotional and sexual abuse as a child, cognitive and academic delays and deficits (mild mental retardation), significant psychosocial immaturity, a history of fire setting and a characterological disorder (Personality Disorder). This evaluation was requested by D.C.Y.F. and the Family Court of Rhode Island.

BACKGROUND INFORMATION: Mrs. Nardolillo, age 29-0, was born in Providence, Rhode Island. It is reported that she has developed very toxic and chaotic relationships with her family. She reports that her father died in 2001. Mrs. Nardolillo especially has a very toxic relationship with her mother. It is reported that Mrs. Nardolillo was not only sexually molested by her father, but also by her mother. Mrs. Nardolillo's mother experienced a stroke in December of 2000 and is currently in the process of being placed in a nursing home. Mrs. Nardolillo is one of several siblings of a blended family system. Social Service records indicate that several of her siblings were also sexually molested. It is reported that she was sexually molested as

a young child (by her father and mother). Despite numerous indicated accounts of physical, emotional and sexual abuse, Mrs. Nardolillo vehemently denies having ever been abused (her high level of denial is a major problem for treatment – see recommendation section), Mrs. Nardolillo reports that she attended public schools and completed the special educational sequence at the Cranston/East High School (1991). She never repeated any grades, but she did receive special educational assistance throughout her academic career. Mrs. Nardolillo reports that she was married in 1992. She states that she had the marriage annulled sometime in 1992 when she found out that her husband was abusive as well as being bisexual. She was married for the second time in 1999 (Irwin [sic] Nardolillo). Mrs. Nardolillo has two children (one child from each of her marriages) Michelle (date of birth 2-10-98). Michelle was placed at birth with a pre-adoptive family and has since been adopted (open adoption). Mr. and Mrs. Nardolillo have a child, Kayla (date of birth 4-13-00). This child was also taken from them at birth and placed in a foster home (the same family that has adopted Michelle). Michelle [sic] denies having a police record. She reports that she currently smokes several cigarettes per day. She denies abusing alcohol or drugs. She states that she is scheduled to return to Family Court on November 16, 2001. Mrs. Nardolillo currently works at a local fast food restaurant (McDonald's). She has never received any type of inpatient psychiatric treatment. She is not currently involved in any type of outpatient counseling (she reports "I'm all done"). A variety of psychological/social services have been offered and provided to Mrs. Nardolillo over the past several years (regarding her). Mrs. Nardolillo was involved, as a child, with D.C.Y.F. (ages 7 through 18). She was involved due to very dysfunctional,

chaotic and toxic family relationships, a history of physical, emotional and sexual abuse as well as fire setting. Medically, Mrs. Nardolillo has been diagnosed with asthma.

MEDICATION STATUS: Mrs. Nardolillo currently takes a variety of medications for asthma as well as seasonal allergies. (See medical reports for specifics).

TESTS ADMINISTERED:

Psychodiagnostic Interview Mental Status Exam
Lateral Dominance Test Aphasia Screening Test
Bender Gestalt Test of Visual Perception
Wide Range Achievement Test
Wechsler Adult Intelligence Scale-3rd Edition
Incomplete Sentence Blank Test
Rorschach Inkblot Test

TEST RESULTS:

BEHAVIORAL OBSERVATION/MENTAL STATUS: Mrs. Nardolillo is a 29-0 year old Caucasian woman with reddish/dark blonde hair and brown eyes. She stands 5 ft. 4 inches tall and weighs in excess of 150 lbs. Her hygiene skills were found to be good. Her attire was casual. She was alert, cooperative and oriented in three spheres (person, place and time). She did not appear to be in any physical discomfort. She is a right-handed individual whose coordination, posture and gait were found to be grossly intact. Her graphomotor abilities were found to be within the borderline range (fine motor skills). Her speech was clear and her expressive vocabulary skills were found to be at the 2nd percentile for adults her age. Her memory for past, recent and personal events were found to be quite

evasive. There was well documented information (i.e. indicated cases of physical, sexual and emotional abuse as well as a history of fire setting). Mrs. Nardolillo vehemently denies that any of these events occurred. Her reality testing is functional. Her social, judgment and reasoning skills on a day to day basis are negatively impacted by her limited cognitive endowment. Her thinking was found to be rather concrete. Fortunately, there was no evidence of any loose associations, perceptual distortions or delusional thinking. Her cognitive skills were assessed and found to be within the mildly mentally retarded ranges. This finding is consistent with previous assessments. Her affect was appropriate. She was not anxious. Her frustration tolerance was found to be somewhat variable. Mrs. Nardolillo is a very psychosocially immature adult. She had some difficulty shifting cognitive sets (consistent with her mild mental retardation). Overall, Mrs. Nardolillo appeared to be able to tolerate the evaluation process.

NEUROPSYCHOLOGICAL FUNCTIONING:
Mrs. Nardolillo's neuropsychological history is positive for cognitive and academic delays and deficits requiring special educational assistance throughout her academic career.

Mrs. Nardolillo's responses to the Wechsler Adult Intelligence Scale-3rd Edition yielded a reliable and valid cognitive profile. Her overall cognitive skills were found to be within the mildly mentally retarded ranges. This finding is consistent with previous assessments and her cognitive/academic histories. Listed below is a summary of her subtest performances on the WAIS-III:

Vocabulary	4
Similarities	5
Arithmetic	3
Digit Span	6
Information	5
Comprehension	7
Picture Completion	4
Digit Symbol	6
Block Design	3
Matrix Reasoning	3
Picture Arrangement	4

Verbal Scaled Score I.Q.	70
Performance Scaled Score I.Q.	63
Full Scaled Score I.Q.	64

(Subtests on the WAIS-III range from a low of 1 to a high of 19. An average subtest score on the WAIS-III is equal 10).

Mrs. Nardolillo is a right-handed individual. No tremors were noted. Her coordination, posture and gait were found to be functional. Her responses to the Aphasia Screening Test reflected academic delays and deficits. Her graphomotor abilities on the Bender Gestalt Test of Visual Perception were found to be within the borderline range. Her current Reading Recognition Skills were found to be at a beginning 5th grade level. Her Math Skills were found to be at the 1st percentile for adults her age.

SOCIAL/EMOTIONAL FUNCTIONING: Mrs. Nardolillo is a 29-0 year old Caucasian woman whose history is documented and positive for physical, emotional and sexual abuse as a young child. It is reported that she was sexually abused by both her mother and father. Mrs. Nardolillo's history is also positive for significant impulsive acting out behaviors and fire setting. She is a very

psychosocially immature person, who vehemently denies her ever having been molested and having ever set any fires. Mrs. Nardolillo has been described as a "liar." She is a very self-centered person, who frequently manipulates the truth for her own benefit. Mrs. Nardolillo's early history has significantly and negatively impacted her ability to initiate, establish and maintain adaptive and trusting interpersonal relationships. She is a very immature woman whose psychological makeup indicates that she would have difficulty emotionally bonding to a young child. She is an individual who tends to put "her needs" first. She frequently becomes very jealous of her husband as well as her child.

Mrs. Nardolillo did not describe any signs or symptoms of a Post Traumatic Stress Disorder.

Mrs. Nardolillo's history is negative for polysubstance abuse.

Mrs. Nardolillo's reports that she does not have any difficulty sleeping. Her appetite is fine. She is not experiencing any suicidal or homicidal ideation.

Mrs. Nardolillo's behavior/interpersonal problems can be traced back many years. Her behavior/interpersonal functioning reflect the presence of a personality disorder with narcissistic and borderline personality characteristics.

Mrs. Nardolillo's responses to projective tasks reflected her grossly intact reality testing (i.e. she is capable of perceiving the world in generally conventional ways). Her responses also reflected her significant psychosocial immaturity, impulsivity, low frustration tolerance and difficulty coping with emotionally charged situations. She

is an individual whose defenses are quite primitive and brittle (i.e. denial).

DIAGNOSIS:

Axis I	V71.09	No Diagnosis
Axis II	317.0	Mild Mental Retardation (with functional ADL skills)
	301.9	Personality Disorder with Narcissistic, Borderline, and Immature Features
Axis III		Reported history of asthma Reported history of seasonal allergies

RECOMMENDATIONS: 1. Dawn Nardolillo, age 29-0, is the mother of a developmentally delayed 18-month-old youngster. Kayla was born on April 13, 2000. She was placed following her birth in a foster home due to Mrs. Nardolillo's multiple emotional, interpersonal and cognitive problems. Mrs. Nardolillo's is an extremely immature and self-centered woman whose capacity for bonding with the young child (given her personality profile) is extremely limited. Mrs. Nardolillo's denial of her own chaotic and abusive early childhood experiences and very enmeshed and toxic relationship with her own mother continue to significantly interfere with her ability to initiate, establish and maintain adaptive and trusting interpersonal relationships. Mrs. Nardolillo is a 29-year-old who has difficulty adequately taking care of herself. Kayla Nardolillo, age 18 months, deserves to grow and develop in a healthy family system that will provide her with emotional stability and permanency. Given Mrs. Nardolillo's psychosocial difficulties, it is recommended to the Family Court that permanency for Kayla be initiated (i.e. termination of

parental rights so that Kayla can be adopted). Mrs. Nardolillo has received a variety of psychological/social services over the years (dating back to her early childhood) with very minimal impact. Future psychological/social services are not recommended.

SJH/dq

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PSYCHOLOGICAL EVALUATION

PATIENT'S NAME: Nardolillo, Irving
DATES TESTED: 10-10 & 10-28-01
PATIENT'S DATE OF BIRTH: 4-28-56
CHRONOLOGICAL AGE: 45-5

REASON FOR THE REFERRAL: Irving Nardolillo, age 45-5, was referred for a Psychological Evaluation of his cognitive and emotional functioning. This evaluation was requested by the Family Court of Rhode Island and D.C.Y.F. to assist in placement decisions regarding Mr. Nardolillo's 18-month-old daughter (Kayla).

BACKGROUND INFORMATION: Mr. Nardolillo was born in Providence, Rhode Island. His parents were divorced. He reports that his father is deceased. Mr. Nardolillo reports that he was raised by his mother. He is one of 13 siblings (7 brothers and 5 sisters). He reports that he attended public schools and dropped out of school when he was 16 years old. He received special educational assistance throughout his academic career. Mr. Nardolillo was never in the military. He reports that he has been married three times. His first marriage lasted approximately 9 months (sometime in the 1980's and ended in divorce). His second marriage began sometime in 1995 and ended several months later (the divorce occurred sometime in 1996). His third marriage began in June of 1999. Mr. Nardolillo has an 18 month old daughter, who is currently in a foster home. He also had a 3-year-old stepdaughter, who was allowed to be adopted (see D.C.Y.F. reports for

specifics). Mr. Nardolillo currently works sporadically as a janitor at the Civic Center in Providence, Rhode Island. He has been receiving social security benefits since the early 1970's. He has never received any type of inpatient psychiatric treatment. When questioned as to whether or not he ever received outpatient counseling, he stated "it wasn't court ordered." Mr. Nardolillo does not smoke cigarettes. His history is reportediy negative for alcohol or drug abuse. He is not currently being treated for any physiological disorders.

MEDICATION STATUS: Mr. Nardolillo is not currently taking any prescribed medications.

TESTS ADMINISTERED:

Psychodiagnostic Interview
Mental Status Exam
Lateral Dominance Test
Aphasia Screening Test
Bender Gestalt Test of Visual Perception
Wide Range Achievement Test
Wechsler Adult Intelligence Scale-3rd Edition
Incomplete Sentence Blank Test
Rorschach Inkblot Test

TEST RESULTS:

BEHAVIORAL OBSERVATION/MENTAL STATUS: Mr. Nardolillo is a 45-5 year old Caucasian male with salt and peppered colored hair and blue eyes. He stands 5 ft. 9 inches tall and weighs 150 lbs. His hygiene skills were found to be good. His attire was casual. He was alert, cooperative and oriented in three spheres (person, place and time). He is a right-handed individual, whose coordination, posture and gait were found to be grossly intact. His speech was clear and his expressive vocabulary skills

were found to be at the 1st percentile for adults his age. His memory for past, recent and personal events were found to be functional. His fund of general information was found to be at the 1st percentile for adults his age. His attention span was found to be at the 5th percentile for adults his age. Mr. Nardolillo's reality testing was found to be grossly intact. There was no evidence of any loose associations, perceptual distortions or delusional thinking. His overall thinking was found to be somewhat concrete. His cognitive skills were assessed and found to be within the mildly mentally retarded ranges. His affect was appropriate. He was not anxious. His frustration tolerance was found to be good. Overall, Mr. Nardolillo was able to tolerate the testing session.

NEUROPSYCHOLOGICAL FUNCTIONING: Mr. Nardolillo's neuropsychological history is positive for cognitive and academic delays and deficits requiring special educational assistance throughout his academic career. His cognitive skills have been assessed in the past and found to be within the mildly mentally retarded ranges.

Mr. Nardolillo's responses to the Wechsler Adult Intelligence Scale-3rd Edition yielded a reliable and valid cognitive profile. His overall cognitive skills were assessed and found to be within the mildly mentally retarded ranges. Both his verbal and nonverbal problem solving skills were found to be within the mildly mentally retarded ranges. Listed below is a summary of his subtest performances on the WAIS-III:

Vocabulary	3
Similarities	5
Arithmetic	5
Digit Span	5
Information	3

Comprehension	3
Picture Completion	5
Digit Symbol	4
Block Design	4
Matrix Reasoning	4
Picture Arrangement	4

Verbal Scaled Score I.Q.	63
Performance Scaled Score I.Q.	64
Full Scaled Score I.Q.	61

(Subtests on the WAIS-III range from a low of 1 to a high of 19.

An average subtest score on the WAIS-III is equal to 10).

Mr. Nardolillo is a right-handed individual. No tremors were noted. His coordination, posture and gait were found to be grossly intact. His responses to the Aphasia Screening Test reflected cognitive and academic delays and deficits. His graphomotor abilities on the Bender Gestalt Test of Visual Perception were found to be within the borderline range. All of his academic skills on the Wide Range Achievement Test were found to be at a below 3rd grade level.

SOCIAL/EMOTIONAL FUNCTIONING: Mr. Nardolillo's history is reportedly negative for physical, emotional or sexual abuse. He does not have a Post Traumatic Stress Disorder.

Mr. Nardolillo's history is reportedly negative for Polysubstance Abuse.

Mr. Nardolillo reports that he does not have any difficulty sleeping. He states that his appetite is fine. He is not experiencing any signs or symptoms of clinical anxiety

or depression. He is not experiencing any suicidal or homicidal ideation.

Mr. Nardolillo is a psychosocially immature 45-5 year old male, who has some difficulty initiating, establishing and maintaining adaptive and trusting interpersonal relationships. His behavior/interpersonal functioning reflect the presence of a characterological disorder (Personality Disorder with Passive Dependent Features). His social, judgment and reasoning skills conceptually were found to be at the 1st percentile for adults his age. He has difficulty detecting the logical sequence of social situations and events (behavioral cause/effect relationships).

Mr. Nardolillo currently lives with his wife in Providence, Rhode Island. They share household chores and Mr. Nardolillo's sister assists with money management. Both Mr. and Mrs. Nardolillo receive social security benefits. Mr. Nardolillo does not have a driver's license. He is capable of taking public transportation. He spends his days at home "hanging around and sleeping." He is capable of attending to his daily personal hygiene needs.

Mr. Nardolillo's responses to projective tasks indicated that he is capable of perceiving the world in generally conventional ways. His responses were found to be rather concrete and reflected his limited cognitive/perceptual abilities. His responses also reflected his psychosocial immaturity.

Mr. Nardolillo is a 45-5 year old male with limited cognitive and academic skills (i.e. mild mental retardation). His social and emotional history is positive for a personality disorder. Mr. and Mrs. Nardolillo have an 18 month old developmentally delayed youngster who is currently in foster care. They have supervised visits with

their child (some of the visits are supervised by his sister and other visits are supervised by D.C.Y.F. personnel). It is reported that a variety of parent/child services have been instituted with "minimal effect." Mr. Nardolillo is a 45 5 year old male with multiple emotional and cognitive difficulties (i.e. Mild Mental Retardation and Personality Disorder). His emotional and cognitive functioning indicates that he has difficulty adequately caring for himself let alone the special needs of a developmentally delayed 18-month-old.

DIAGNOSIS:

Axis I	V71.09	No Diagnosis
Axis II	317.0	Mild Mental Retardation
	301.9	Personality Disorder with Passive/ Dependent and Immature Features
Axis III	None	

RECOMMENDATIONS: For recommendations regarding Mr. Nardolillo's reunification with his daughter, Kayla, see recommendations section on Mrs. Dawn Nardolillo's Psychological Evaluation that was conducted by this examiner (9-28 and 10-10-01).

SJH/dq

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APPENDIX C

[LOGO] MENTAL HEALTH SERVICES

A Gateway Healthcare Provider

1443 Hartford Avenue
Johnston, RI 02919
Tel. (401) 273-8100
Fax (401) 861-8696

PSYCHIATRIC EVALUATION

Name:	Client No.:	Date:
Dawn Nardolillo	#000013149	10/11/01

DOB: 9/15/72

IDENTIFYING INFORMATION:

Ms. Nardolillo is a 29-year-old white female interviewed at the request of domestic court and DCYF as part of an ongoing assessment of her capacity to manage raising her youngest child. Psychiatric evaluation consisted of an individual appointment, phone contact with DCYF supervisor and record review.

RECORDS REVIEWED INCLUDED:

DATE	SOURCE	NOTE
8/24/01	CCAP	Letter regarding discharge from Individual Therapy

8/15/01	Children, Friends & Services	Addendum to 8/1/01
8/1/01	Children, Friends & Services/Partners and Permanency	Summary of concerns regarding observations 5/01 – 8/01
8/1/01	Meeting Street School	Letter regarding domestic conflict
7/01	The Providence Center	Parent-Child Assessment
3/20/01	John Hope	Settlement Summary of Parent Aide Services (provided 2/01 – 3/01)
6/00	Spurwink	Summary of Supervised Visits 1/00 – 6/00
11/99	Dr. Hayden	Psychological Evaluation
11/98	Family Services	Summary of Individual Treatment 8/98 – 10/98
10/98	Dolan/Adel	Parent-Child RE:Michelle
5/98	Dr. Parsons	Psychological Evaluation
6/88	Mental Health Services	Psychiatric Evaluation by Dr. Bauermeister
	DCYF	Case Profile Narrative

The nature of this evaluation, the lack of confidentiality and the expectation of a report to the court and DCYF were discussed with Ms. Nardolillo at the beginning of the interview. She appeared to understand and agreed to be interviewed.

HISTORY OF PRESENT ILLNESS:

In reviewing her current status and the history leading to her current situation, Ms. Nardolillo was essentially unable to give any reason whatsoever for her loss of her children. She attempted to attribute blame to a variety of DCYF workers, previous assessments and conflict between her husband and her mother. However, throughout, she was completely unable to articulate the reasons why her child might have been removed in the first place or the reason for ongoing concern by a variety of providers and observers. Her description of her history was grossly divergent from that documented in previous assessments including documentation of her level of function at age 15 and subsequent documentation of her difficulties since then. Her description of her medical conditions diverged from her previous descriptions documented in the record. Her descriptions of her financial status and her interactions with others living in her building diverged from the record, as well.

Ms. Nardolillo denied any significant psychiatric symptoms. She was able to acknowledge distress at the loss of her children. She was not able to discuss that distress. She acknowledged the conflicts between her husband and her mother, but could not discuss any personal response to that conflict.

Ms. Nardolillo has been involved with DCYF for her own care and then resumed involvement regarding her capacity to parent. Records are consistent regarding the frequent expressions of concern by school, therapist and DCYF providers regarding level of disturbed interaction with her mother, evidence of neglect and abuse, recurrent aggression and self-injurious behavior. At the time of Ms.

Nardolillo's first pregnancy (Michelle – 3-years-old) her living conditions (including homelessness, difficulty with her mental state and evidence of continuing to live with her own mother) led to an ex parte removal and non-relative foster placement. Subsequently, on extensive series of observations, attempts to provide training and education regarding parenting and independent assessments of Ms. Nardolillo's psychological capacities were provided. Those observations included the period of her subsequent pregnancy with her daughter Kayla and a period of visitation with both children. Since then, observations have included attempts to provide in-home supervised visits and parenting education.

PAST PSYCHIATRIC HISTORY:

Ms. Nardolillo's record of psychiatric assessment by Dr. Bauermeister in 1988 includes reference to 14 different documents including several psychological assessments and 6 previous psychiatric assessments. At that time, the record was quite consistent indicating a highly pathologic, enmeshed and volatile relationship between Dawn and her mother. Her difficulty with giving an accurate report was already well documented. Her recurrent self-injurious behavior was described. The persistent inability to process the events in her environment which did not fit her overall goals, was also described. Subsequent evaluations, including 2 comprehensive psychological assessments and 2 parent-child assessments, are essentially consistent with that description. Moreover, they are also consistent with subsequent descriptions of her interactions with her children (both Michelle and Kayla). The recurring theme is an essential difficulty with interpreting the behavior of others as indicative of their own needs, capacities and

level of development rather than a projection of her needs, desires or concerns at that time. In addition those records consistently describe an inability to respond to redirection in a meaningful way. She displayed consistent use of distortion, outright lies, "mis-remembering" and evasion in order to proceed with her stated goal.

MEDICAL HISTORY:

Ms. Nardolillo indicates that she suffers from asthma and "emphysema." She reported that she is presently taking "Azmacort, Albuterol and a nebulizer (for an uncertain medication.)" In addition, she indicates that she continues to smoke at least "a half pack a day." She indicated that she had been in a coma secondary to domestic violence in 1997. She reported that she continues to suffer from headaches. She reports a rash when she uses Motrin, but denies any other allergies to medication.

Records indicated no coma history. No other indication of asthma or "emphysema" has been seen in the record or reported.

PSYCHOSOCIAL HISTORY:

Ms. Nardolillo reports that she presently resides with her husband Irving in the second floor apartment where her rep payee lives on the first floor as her landlord. She reports that her mother had served as her rep payee and had lived with them up until a recent stroke. Consequently, her mother is now (reportedly) incapacitated and is unlikely to be able to return to living with her. Ms. Nardolillo reports that her first child, Michelle, lives in the home of Michelle's adoptive parents, Debbie and George,

along with Ms. Nardolillo's younger child Kayla (18 months). She was unable to describe Kayla's development, current psychosocial status or likes and interests. When asked about Kayla's medical needs, she notes that Kayla "wheezes in the summer" and that she now uses a nebulizer. She explained that she had to "use 9-1-1" once due to her breathing difficulties.

Ms. Nardolillo reports that she had initially been sexually abused by her father at around age 8. She then indicated that she had been in DCYF custody between ages 8 and 10 and that she was then released to her father from whom she went AWOL (at 10). She reports then being taken by DCYF to St. Mary's where she remained for a year until she was eventually released to her mother. She notes that her father was then arrested and jailed for the next 3 years. None of those details were corroborated with her record.

Ms. Nardolillo reports that she is presently a student at CCRI where she is studying Daycare for a certificate. She indicated that she had graduated from Cranston East High School with "high honors" from special education classes. She explains that she was in special education because she was "slow in Math" and that she "got nervous" when there were more than 10 children in the room with subsequent decrease in concentration. She describes herself as having fights with her peers after being teased and harassed for her poor handwriting and her clothing. She indicates that she was treated with Ritalin until about age 14. Ms. Nardolillo reports that she has been working at McDonald's for the week prior to this evaluation and that she had previously worked at McDonald's for 6 months, one year ago. She described another job where she had worked doing wrapping and shipping and indicated

that she had worked in daycare in 1991 and 1992 at "Jack and Jill." She indicated that she had been working for Fleet Bank since 1997 doing hourly work and doing piecework for "Dave and Son's" as well as other work doing jewelry soldering, carding and packing.

MENTAL STATUS EXAM:

Ms. Nardolillo presented as a casually dressed coarsely groomed white female who looked approximately her stated age. She sat easily for an extended appointment. Eye contact was good. Speech was somewhat loud with unusual articulation, but she could make herself understood without much difficulty. Rate of her speech was normal with normal rhythm. Language was limited with simplistic descriptions and she had a notable difficulty describing complex interactions or sequences. She denied symptoms of common delusions or hallucinations. She denied disturbance of sleep, appetite or mood with the exception of an assertion that she has ongoing distress over separation from her children. She denied suicidal ideation.

IMPRESSION:

Ms. Nardolillo presented for a court ordered psychiatric evaluation, appeared to understand the purpose of the assessment and that the report would be going directly to court and DCYF. She made her desire of gaining control over her younger child perfectly clear. However, she was essentially unable to describe herself, her child or her living situation in more than a simplistic, sugar coated and generally inaccurate manner. None of her descriptions coincided with other documented reports. There was clear

indication that she had continued to elaborate and expand on previous attempts to blame others for her misfortunes and losses. Despite previous experience with having been penalized for failure to process and for failure to be forthcoming with assessments, she was essentially unable to do so again today.

Previous diagnoses of Mild Mental Retardation vs. Borderline Intellectual Functioning and Personality Disorder are entirely consistent with her presentation. There is no indication of other major mental illness in her presentation to me or in her records. She is likely to continue to have significant difficulty adapting her behavior and expectations to the changing needs of her growing child. Moreover, records suggest that her daughter has already been identified with global delays and will require even more attentive nurturing than most children.

Ms. Nardolillo has not been able to participate in a verbally based therapy up to this point. She is unlikely to be able to do so in the future. She has not developed an empathic parenting style with several years of supervised visits, classes and the consistent threat of permanent loss of her children if she fails to work in these treatments. She has been able to master some basic skills and with support, should be able to continue to learn specific limited mechanical skills needed to parent. However, her lack of empathy and inability to use language truthfully and inflexible approaches to meeting her own needs, are likely to grossly impair her ability to effectively parent her daughter.

DIAGNOSES:

AXIS I	None.
AXIS II	Mild Mental Retardation. Cluster B Personality Disorder, Antisocial and Borderline Features.
AXIS III	Asthma by report and nicotine dependence.
AXIS IV	Problems with legal system.
AXIS V	Current GAF 60.

/s/ David C. Savitzky
David C. Savitzky, MD

APPENDIX D

TITLE 15
Domestic Relations

CHAPTER 15-7
Adoption of Children

SECTION 15-7-7

§ 15-7-7 Termination of parental rights. – (a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:

(1) The parent has willfully neglected to provide proper care and maintenance for the child for a period of at least one year where financially able to do so. In determining whether the parent has willfully neglected to provide proper care and maintenance for the child, the court may disregard contributions to support which are of an infrequent and insubstantial nature; or

(2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:

(i) Institutionalization of the parent, including imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

(ii) Conduct toward any child of a cruel or abusive nature;

(iii) The child has been placed in the legal custody or care of the department for children, youth, and families and the parent has a chronic substance abuse problem and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. The fact that a parent has been unable to provide care for a child for a period of twelve (12) months due to substance abuse shall constitute prima facie evidence of a chronic substance abuse problem;

(iv) The child has been placed with the department for children, youth, and families and the court has previously involuntarily terminated parental rights to another child of the parent and the parent continues to lack the ability or willingness to respond to services which would rehabilitate the parent and provided further that the court finds it is improbable that an additional period of services would result in reunification within a reasonable period of time considering the child's age and the need for a permanent home;

(v) The parent has subjected the child to aggravated circumstances, which circumstances shall be abandonment, torture, chronic abuse and sexual abuse;

(vi) The parent has committed murder or voluntary manslaughter on another of his or her children or has committed a felony assault resulting in serious bodily injury on that child or another of his or her children or has aided or abetted, attempted, conspired or solicited to commit such a murder or voluntary manslaughter; or

(vii) The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as

to render it improbable for the parent to care for the child for an extended period of time;

(3) The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home; or

(4) The parent has abandoned or deserted the child. A lack of communication or contact with the child for at least a six (6) month period shall constitute prima facie evidence of abandonment or desertion. In the event that parents of an infant have had no contact or communication with the infant for a period of six (6) months the department shall file a petition pursuant to this section and the family court shall conduct expedited hearings on the petition.

(b) In the event that the petition is filed pursuant to subdivisions (a)(1), (a)(2)(i), (a)(2)(iii), or (a)(2)(vii) of this section, the court shall find as a fact that, prior to the granting of the petition, such parental conduct or conditions must have occurred or existed notwithstanding the reasonable efforts which shall be made by the agency prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family. In the event that a petition is filed pursuant to subdivisions (a)(2)(ii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi) or (a)(4) of this section, the department has no

obligation to engage in reasonable efforts to preserve and reunify a family.

(2) Any duty or obligation on the part of a licensed or governmental child placing agency to make reasonable efforts to strengthen the parental relationship shall cease upon the filing of a petition under this section. This provision shall not be construed and is not intended to limit or affect in any way the parents' right to see or visit with the child during the pendency of a petition under this section.

(3) Upon the filing of a termination of parental rights petition, the agency has an affirmative duty to identify, recruit, process and approve a qualified family for adoption or other permanent living arrangement for the child.

(c) In considering the termination of rights as pursuant to subsection (a), the court shall give primary consideration to the physical, psychological, mental, and intellectual needs of the child insofar as that consideration is not inconsistent with other provisions of this chapter.

(2) The consideration shall include the following: If a child has been placed in foster family care, voluntarily or involuntarily, the court shall determine whether the child has been integrated into the foster family to the extent that the child's familial identity is with the foster family and whether the foster family is able and willing to permanently integrate the child into the foster family; provided, that in considering integrating into a foster family, the court should consider:

(i) The length of time child has lived in a stable, satisfactory environment and the desirability of maintaining that environment and continuity for the child; and

(ii) The reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference.

(d) If the court finds that the parental rights of the parent should be terminated as specified in subsection (a), it shall by decree duly entered, appoint some suitable person to give or withhold consent in any subsequent adoption proceedings. In the case of petitions filed by licensed or governmental child placement agencies, the court shall appoint the agency to be the sole party to give or withhold consent to the adoption of the child and further vest the agency with all rights of guardianship over the child.

(e) Nothing in this section shall be construed to prohibit the introduction of expert testimony with respect to any illness, medical or psychological condition, trauma, incompetency, addiction to drugs, or alcoholism of any parent who has exhibited behavior or conduct that is seriously detrimental to a child, to assist the court in evaluating the reason for the conduct or its probable duration.

(f) The record of the testimony of the parties adduced in any proceeding terminating parental rights to a child shall be entitled to the confidentiality provided for in § 8-10-21 and more specifically shall not be admissible in any civil, criminal, or other proceeding in any court against a person named a defendant or respondent for any purpose, except in subsequent proceedings involving the same child or proceedings involving the same respondent.

(g) In the event any child, the parental rights to whom have been finally terminated, has not been placed by the agency in the home of a person or persons with the intention of adopting the child within thirty (30) days from the date of the final termination decree, the family court shall review the status of the child and the agency shall file a report that documents the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, this documentation shall include child specific recruitment efforts, such as the use of state, regional and national adoption exchanges, including electronic exchange system.

APPENDIX E

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **FAMILY COURT**

IN RE: KAYLA FC NO. P **01-0101**

JUDGMENT

This matter came on for hearing, before the Honorable Justice John A. Mutter on the Petition filed by the Department of Children, Youth, and Families (DCYF), for Termination of Parental Rights. After hearing thereon and consideration thereof, the Court made the following findings of fact and rendered a written decision on the 22nd day of January, 2003, which is attached hereto and incorporated herein.

1. The child, Kayla, was born April 13, 2000.
2. Kayla was the first child fathered by the Respondent Father, although this was his third marriage.
3. The Respondent Mother, prior to the birth of Kayla, had given birth to another child named Michelle, who had been fathered by another man. In 1998, the Respondent Mother, did a voluntary consent as to this child, who was adopted by her foster parents.
4. At the time of Kayla's birth, there were no relatives of the biological parents with whom she could be placed, though the Department of Children, Youth and Families made efforts to place the child in relative foster placement.
5. Kayla reportedly has certain developmental delays.

6. By expert testimony, both of the biological parents have been described as mildly, retarded.

7. Kayla, upon her release from the hospital at age thirteen days, was placed with the same foster parents who had adopted her half-sister. Kayla remains in that same placement to the present time.

8. On December 1, 2001, the Respondents admitted to an allegation of dependency based upon their cognitive limitations.

9. A Petition for Termination of Parental Rights was filed on January 10, 2002.

10. In April of 2002, a Petition for Adoption was filed, signed by the Respondent Father's sister, Sandra.

11. The Respondents, after the commencement of hearing on the Termination Petition, sought the intervention of the Rhode Island Supreme Court, requesting that the Supreme Court order the Adoption Petition be given a priority hearing. The higher court ordered that both petitions be entertained by this Court at the same time.

12. Expert testimony established that the Respondents cannot care for Kayla without constant on-site supervision.

13. Both Respondent parents have testified and both have admitted substantially what the experts have averred.

14. The petitioning aunt in the adoption matter testified that, in her opinion, her brother cannot care for the child without the help specified by the experts.

15. This Court is of the opinion that the inability to act or react to a situation which could imperil the child and ultimately cause harm to the child, constitutes unfitness.

16. The Court finds that there is no probability that Kayla could safely be returned to her parents' care, considering the mental and emotional condition of the parents and the special needs of this child, including the need for a permanent, safe and stable home, within a reasonable period of time.

17. The Court finds, by clear and convincing evidence, that the Respondent parents are unfit.

18. The Court finds that the grounds for termination have been proven by clear and convincing evidence.

19. The Court finds that it is in the best interests of the child, Kayla, that the parental rights of the Respondents be terminated.

WHEREFORE, the following is,

ORDERED, ADJUDGED, AND DECREED

1. The parental rights of the Respondent mother, Dawn Nardolillo, are hereby terminated.

2. The parental rights of the Respondent father, Irving Nardolillo, are hereby terminated.

3. The Department of Children, Youth, and Families shall be the sole party to give or withhold consent to the adoption of this child.

4. The Department is appointed as Guardian of the child for all purposes.

ENTERED: PER ORDER:

/s/ D. Montanaro /s/ Mutter, J.
Dep. Clerk

Presented by:

Department of Children, Youth and Families,
By and through its Counsel,

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CERTIFICATION

The undersigned hereby certifies that a true copy of the within was mailed to the following Counsel of Record, on this 11th day of February, 2003.

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APPENDIX F

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC — SUPREME COURT

IN RE KAYLA N. — M.P. #2002-313
FC #1998-00336-02
Pet. #02-0000-342

ORDER

This matter came before the Honorable Supreme Court Justice Bourcier on May 23, 2002 for conference on a joint Emergency Motion for Stay and on a joint Petition for Writ of Certiorari filed by Dawn Nardolillo and Irving Nardolillo (the biological parents of Kayla N., born 4/13/00), and by Sandra Nardolillo (Kayla's paternal aunt). Following said conference it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. The petitioners' Petition for Writ of Certiorari is GRANTED;
2. The Family Court shall hear the petitioners' petition for direct consent adoption;
3. The hearing on the direct consent adoption petition shall be consolidated with the termination of parental rights hearing, currently scheduled for May 24, 2002.
4. Sandra Nardolillo, Kayla's paternal aunt, has standing in the adoption petition;
5. Kayla's non-relative foster caretakers do ***not*** have standing in this matter;
6. The petitioners' Emergency Motion for Stay is DENIED

ORDERED:

/s/ [Illegible]
SUPREME COURT
CLERK

ENTERED:

/s/ Bourcier, J.
SUPREME COURT
JUSTICE
DATED: 5/23/02

(4)

No. 06-603

Supreme Court, U.S.
FILED
FEB 9 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Irving and Dawn N. challenge the decision of the Rhode Island courts to terminate their parental rights to their daughter, Kayla. They contend that the judgment of termination discriminated against them on the basis of disability in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (Title II). In affirming that judgment, the Rhode Island Supreme Court specifically held that "a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA" (Pet. App. 11a). Our petition for writ of certiorari (at 8-12) showed that this holding contradicts the plain text of Title II and conflicts with this Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). The Rhode Island Supreme Court's holding also implicates a widespread confusion among state courts regarding application of Title II to termination of parental rights proceedings, and it conflicts with the holding of at least six federal circuits that Title II applies to everything a state government does (Pet. 12-19).

Respondent acknowledges that "[i]t is undisputed that the state courts have taken different positions regarding whether and how Title II of the ADA applies to termination of parental rights proceedings" (Opp. 21). And although Respondent contends that "the ADA does not apply to TPR proceedings" (Opp. 20), it does so only by ignoring key language of Title II. Title II applies to all "activities" of a state government entity, and it prohibits all disability-based "discrimination" by such an entity. 42 U.S.C. § 12132. That language plainly covers discrimination in the termination proceedings themselves. Respondent also asserts that because state-law "reasonable efforts" requirements may

apply to family reunification services often provided before termination, there is no reason to apply Title II to the termination proceeding (Opp. 21). But that assertion ignores the central basis for Petitioners' claims – that the state courts' judgment of termination *itself* discriminated against Irving and Dawn on the basis of disability. In the end, the brief in opposition only underscores the confusion in the lower courts and the errors in the Rhode Island Supreme Court's decision.

A. The Decision of the Rhode Island Supreme Court Conflicts with Title II's Plain Text and This Court's Decision in *Yeskey*

1. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This Court's decision in *Yeskey* held that courts must give effect to that broad language and may not carve areas of state government out of the statute's coverage. *See Yeskey*, 524 U.S. at 209-212. Title II prohibits discrimination in termination of parental rights proceedings, which are at the very least "activities of a public entity" (*see* Pet. 9-10). Respondent argues that Title II does not reach these proceedings, but its arguments ignore the plain text of the statute.

First, Respondent contends (Opp. 12-14) that termination of parental rights proceedings are not "departments" or "agencies" of state government and therefore do not come within the statutory definition of "public entity." But the relevant question is not whether the *proceedings* are a "public entity" – just as the relevant question in *Yeskey*

was not whether Pennsylvania's Motivational Boot Camp program was a "public entity." Rather, the question is whether the state court that terminated Irving and Dawn's parental rights is a "public entity" – and it clearly is. The ADA does not limit the definition of "public entity" to "departments" and "agencies," but reaches "any . . . other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). If Title II did not reach the actions of state courts, this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), which upheld Title II as applied to judicial proceedings, would make no sense.

Second, Respondent misreads Title II to apply only when an individual is " 'excluded from participation' or . . . 'denied the benefits of the services, programs or activities of a public entity' " (Opp. 14, quoting 42 U.S.C. § 12132). But again, Title II extends far beyond exclusion from participation and denial of benefits; it also prohibits states from "subject[ing qualified individuals with disabilities] to discrimination." 42 U.S.C. § 12132. Whether or not the state court excluded Irving and Dawn or denied them a benefit (and denying them the right to parent their child certainly can be characterized as both), Irving and Dawn clearly contend that the state court subjected them to discrimination. That is all that is necessary to invoke Title II's coverage.

2. Respondent appears to draw a distinction between termination of parental rights proceedings (which it contends are not covered by Title II) and the family reunification services that state law often requires before termination may be sought (which it concedes are covered by Title II) (Opp. 16-17, discussing *Adoption of Gregory*, 747 N.E.2d 120 (Mass. 2001)). Thus, while Respondent insists that parents may not raise the ADA as a "defense

in termination proceedings" (Opp. 21), it suggests that Irving and Dawn could have raised their Title II challenges (to reunification services only) in a separate action. The Rhode Island Supreme Court did not rely on that proceedings/services distinction. Nor did it even cite *Gregory*, the case to which Respondent points as establishing that distinction.

In any event, Respondent's asserted distinction finds no support in Title II, which applies to any "activity" of state government. 42 U.S.C. § 12132. As we showed in our petition (at 9), termination of parental rights proceedings themselves – and not just the services provided prior to initiation of those proceedings – meet the standard definitions of the term "activity." Although Respondent cites lower-court cases that, by *ipse dixit*, declare termination proceedings not to be "activities" (Opp. 18-23), neither those cases nor Respondent's brief in opposition offer any established definition of "activity" (or even any newfangled and made-up definition of "activity") that would exclude those proceedings from Title II.

In many instances, it is the termination proceeding – and not any services provided (or not provided) prior to the initiation of that proceeding – that discriminates on the basis of disability (*see* Pet. 20-21). When, for example, a state court terminates a parent's rights based on stereotypes about the parenting abilities of people with a given disability, it is engaging in discrimination that plainly comes within Title II's text. But under Respondent's reading, the ADA cannot reach that discrimination.

Two of Petitioners' three Title II claims relate entirely to the conduct of the state courts: (1) the claim that the key testimony supporting the decision to terminate rested

on stereotypes about the parenting skills of people with mental retardation (*see* Pet. 8); and (2) the claim that the state courts refused to consider whether permitting Sandra N. to adopt Kayla would be a proper "reasonable modification" under the ADA (*Id.*). And the third claim – that the state's reunification services were not properly tailored to Irving and Dawn's disabilities (*Id.*) – also turns crucially on the state courts' conduct in the termination proceedings. Irving and Dawn did not seek parenting services in the abstract. To the contrary, their reunification-services claim is that the termination of their parental rights is unlawful under Title II because the state courts issued their judgment of termination even though the state never gave Irving and Dawn sufficient disability-tailored parenting services. That claim also did not ripen until the termination proceedings.

For these reasons, Respondent is incorrect to assert (Opp. 17) that Petitioners somehow waived their Title II claims by failing to raise them *prior to the initiation of the termination proceedings*. The Rhode Island courts did not rule that Petitioners waived their Title II claims, nor would such a ruling be supportable. Because Petitioners challenge the initiation of – and decisions made in the course of – the termination proceeding itself, their claims could not have been raised earlier.

Moreover, the prospect that parents like Irving and Dawn could assert their Title II claims in a *subsequent* proceeding is illusory. In Rhode Island and most other states, a judgment terminating parental rights is "irrevocabl[e]." *In re Kyle S.*, 692 A.2d 329, 334 (R.I. 1997). Accordingly, Irving and Dawn could not go to state court to attack the judgment collaterally on Title II grounds. And they could not go to federal court to do so. Because they

would be "i[illegible]ng district court review and rejection of" the state-co[illegible] judgment, the *Rooker-Feldman* doctrine would bar jurisdiction. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). And even if that hurdle could be overcome, the "domestic relations" exception would bar jurisdiction. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 513-514 (1982) (federal district courts lack "jurisdiction to relitigate state custody decisions"). The only meaningful time at which parents can challenge the termination of their parental rights is in the termination proceedings themselves.

B. This Case Implicates Persistent Confusion in the Lower Courts

Respondent asserts (Opp. 21-28) that there is no conflict in the lower courts on the question presented. Even if that were true, certiorari would still be appropriate given state courts' persistent refusal to apply Title II according to its plain text. *See Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (granting certiorari where lower courts unanimously read a federal statute in conflict with its plain text).

In any event, Respondent does not dispute the basic point: If this case had arisen in Iowa or Washington, Petitioners' Title II claims would have been considered on the merits, in accordance with the principle, adopted by at least six federal circuits, that Title II applies to everything a state does. But because the Rhode Island Supreme Court chose to join the 15 other states that hold the ADA inapplicable to termination of parental rights proceedings, the

state courts did not even consider Petitioners' claims (*see* Pet. 13-19).

C. The Question Presented is Exceptionally Important to Petitioners and to Parents with Disabilities – and Their Children – Across the Nation

The question presented is exceptionally important to the 6.9 million custodial parents with disabilities in the United States – and to their children (Pet. 19-22). An order permanently and irrevocably terminating parental rights is one of the most severe infringements on liberty a state can impose. Commentators have repeatedly observed that there is widespread discrimination against parents with disabilities in parental-rights termination proceedings. The amicus brief submitted on behalf of the American Association on Intellectual and Developmental Disabilities, the Arc of the United States, and other organizations and law professors highlights the disturbing extent of that problem.

1. Respondent suggests that it makes little difference whether Title II applies to termination proceedings, because states have a duty (under state law) to "provide reasonable efforts to reunify a parent and a child in certain situations" before terminating parental rights (Opp. 21). It points (at 22-23) to a Michigan ruling that a court cannot find "reasonable efforts" if the state's reunification services violated the ADA. *In re Terry*, 610 N.W.2d 563, 570 (Mich. App. 2000). But that case conflicts with the decision under review. Unlike the Michigan Court of Appeals in *Terry*, the Rhode Island Supreme Court refused to consider whether the state's provision of reunification services violated Title II (*see* Pet. App. 10a-13a). The Rhode Island Family Court's opinion was explicit on this

point: Because that court concluded that Title II "is not applicable," it specifically rejected the proposition that the state was required to make "special efforts" that would take account of Irving and Dawn's mild mental retardation (*Id.* at 40a). The Rhode Island courts' "reasonable efforts" determination was therefore explicitly divorced from any ADA requirements.

For that reason, Respondent is wrong to contend (at 27-28) that, because the Rhode Island courts found "reasonable efforts" at reunification, "the Americans with Disabilities Act was not violated." The state did, for the first nine months of Kayla's life, provide Irving and Dawn with parenting services through Spurwink of Rhode Island that were geared toward people with intellectual disabilities (*see* Pet. 2-3). But after it canceled Spurwink's contract to provide services to them, the state referred Irving and Dawn to a series of programs, none of which were tailored toward parents with disabilities (*Id.* at 3-5). By the time the state filed its petition for termination of parental rights, a year had passed since Irving and Dawn had received any services that took account of their disabilities (*Id.* at 5). Even if the Rhode Island Supreme Court was correct to conclude that the state provided "reasonable efforts" at reunification under state law, there is powerful reason to believe that the state violated Title II by terminating Irving and Dawn's parental rights without providing "reasonable modifications" that took account of their disabilities.

Even if state-law "reasonable efforts" requirements did apply the ADA's standards to the state's *reunification services*, that would be no substitute for applying Title II to the termination proceedings directly. For one thing, as Respondent acknowledges (at 21), the state-law duty to

provide "reasonable efforts" and reunification services applies only "in certain situations." More important, a judgment terminating parental rights might discriminate on the basis of disability for reasons having nothing to do with the state's reunification services. For example, when a state court terminates parental rights based on a stereotype about the parenting skills of people with disabilities, it discriminates in a way that the "reasonable efforts" requirement cannot capture.* Our petition showed (at 20-21) that stereotype-based discrimination is pervasive – and this case involves stereotype-based discrimination in the termination decision (*see* Pet. 8).

2. Respondent asserts (at 29) that "prolonging this litigation" will have an adverse effect on Kayla. But here – unlike in the case it cites – Respondent points to absolutely no evidence of such an adverse effect. *Cf. Castorr v. Brundage*, 459 U.S. 928, 930 (1982) (Stevens, J., respecting denial of certiorari) ("The record strongly suggests that prolongation of this litigation might have a serious adverse effect on the emotional and physical health of the child."). A state cannot terminate parental rights in violation of federal law and then foreclose an appeal simply by making unsupported claims that this Court will do harm by enforcing that law.

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* The "reasonable efforts" requirement also cannot capture those reasonable modifications, like Petitioners' request that Sandra be permitted to adopt Kayla, that would not lead to family reunification. The state courts rejected that request on state-law grounds without ever considering whether it might be justified as a reasonable modification (*see* Pet. App. 17a-19a). Contrary to Respondent's suggestion (at 28-29), that state-law determination says nothing about whether Petitioners' Title II claim is viable.

Here, federal law is clear: Title II of the ADA provides that a state may not discriminate on the basis of disability in any of its activities. But the Rhode Island Supreme Court, in accord with courts in 15 other states, held that Title II does not apply to a state activity that implicates one of the most powerful interests of individuals with disabilities: their legal right to be parents to their children. The question presented is of the highest importance to Petitioners and to parents with disabilities across the Nation, as well as to their children.

CONCLUSION

For the foregoing reasons and the reasons set forth in our petition for writ of certiorari, the petition for writ of certiorari should be granted.

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February 9, 2006

(3)

No. 06-603

In the

Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,
Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,
Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, THE CENTER ON CHILDREN AND FAMILIES, THE CENTER FOR RIGHTS OF PARENTS WITH DISABILITIES, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL DISABILITY RIGHTS NETWORK, THE SYRACUSE UNIVERSITY CENTER ON HUMAN POLICY, LAW AND DISABILITY STUDIES, AND LAW PROFESSORS STEPHEN F. BEFORT, PETER BLANCK, ROBERT A. BURT, MARY CROSSLEY, ROBERT D. DINERSTEIN, ELIZABETH F. EMENS, CHAI FELDBLUM, SETH HARRIS, SHARONA HOFFMAN, ARLENE S. KANTER, PAUL STEVEN MILLER, MARTHA L. MINOW, WENDY E. PARMET, MICHAEL L. PERLIN, ANI B. SATZ, MICHAEL SCHWARTZ, MICHAEL ASHLEY STEIN, MICHAEL WATERSTONE, AND MARK C. WEBER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici submit this brief to inform the Court of the extensive evidence of state-instigated interference with the rights of persons with intellectual disabilities to form and maintain families.[1]

Amici law professors[2] research and teach in the field of disability law and family law and have an interest in ensuring that state courts correctly apply federal statutes aimed at eradicating discrimination against persons with disabilities.

Amicus the American Association on Intellectual and Developmental Disabilities ("AAIDD") was formerly known as the American Association on Mental Retardation and under that name has appeared as *amicus curiae* in numerous cases. Founded in 1876, AAIDD is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities. AAIDD promotes progressive policies, sound research, effective practices, and human rights for people with intellectual and developmental disabilities.

Amicus The Arc of the United States, formerly known as the Association for Retarded Citizens of the United States, is the largest national voluntary organization in the United States dedicated solely to protecting the interests of the

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A complete list of *amici* law professors is set out in the appendix.

millions of adults and children with intellectual disabilities. (The Arc now uses "intellectual disability" to mean "mental retardation.") With approximately 875 state and local chapters, The Arc is well positioned to comment on the impact of state family law statutes upon people with intellectual disabilities and their children.

Amicus the Center on Children and Families ("CCF") at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and families in a variety of settings, including the Child Welfare Clinic, Gator TeamChild juvenile law clinic, and its Pro Se and Family Law clinics.

Amicus the Center for Rights of Parents with Disabilities at the Colorado Cross-Disability Coalition is a non-profit advocacy organization that provides legal assistance to parents with disabilities. The Coalition was founded in 1990 to promote independence, self-reliance, and full participation for people with all types of disabilities. It founded the Center for Rights of Parents with Disabilities in response to the widespread involvement of parents with disabilities in child welfare cases. Through direct

representation, education, research, and training, the Center combats discrimination that impacts parenting for parents with disabilities. Focused exclusively on the rights and representation of parents with disabilities, the Center is particularly suited to comment on the treatment of parents with disabilities in child welfare systems.

Amicus the Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental illness and mental retardation. The Bazelon Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in society, including the rights to have families and raise children. The Center has extensive experience with child welfare and mental health systems across the country.

Amicus the National Disability Rights Network ("NDRN"), formerly the National Association of Protection & Advocacy Systems, is the membership association of protection and advocacy systems located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). Protection and advocacy systems ("P&A's") are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of people with disabilities in a variety of settings. Collectively, the P&A network is the nation's largest provider of such services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act.

Because of its national P&A membership and familiarity with the protections afforded by each State to persons with disabilities, NDRN has firsthand knowledge of state laws and how they operate in practice. NDRN is thus well placed to assist the Court in surveying the impact upon persons with disabilities of state laws regarding the termination of parental rights.

Amicus the Syracuse University Center on Human Policy, Law and Disability Studies ("CHPLDS") is dedicated to the study and promotion of inclusion and equality for people with disabilities locally, nationally, and globally. The CHPLDS is an expansion of the Center on Human Policy, which was founded in 1971 as a Syracuse University based organization involved in the national movement to secure the rights of people with disabilities, particularly people with cognitive disabilities. In 2004, the Center expanded to become the nation's first university-based multi-disciplinary center to facilitate a critical examination of disability as an aspect of diversity in society through academic programs, research, training, advocacy, and public education. The CHPLDS is joined as *amicus* with the College of Law's Disability Law and Policy Program, which is part of the CHPLDS, and which houses the nation's first joint degree program in law and disability studies.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioners that this Court should grant certiorari on the question presented in the petition—whether Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts. The Rhode Island Supreme Court

has held that because a termination of parental rights proceeding is "'for the benefit of the child, not the parent,'" Petition App. 11a (quoting *M.C. v. Department of Children and Families*, 750 So. 2d 705, 706 (Fla. Dist. Ct. App. 2000)), such a proceeding "does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." *Id.* As the Petition demonstrates, the decision squarely conflicts with the decision of this Court in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), which construed the same title of the ADA to apply to state prisons. The decision also contradicts holdings by the courts of at least two other States, which have held that Title II applies to state termination of parental rights proceedings. Petition at 7-18. Petitioners correctly note that this Court is the only tribunal capable of correcting such errors and variances in the application of a federal statute. *Id.*

Amici file this petition to stress to the Court that discrimination against parents with intellectual disabilities is a widespread and serious problem. Carrying on a shameful tradition of discrimination against people with disabilities, the States are still erecting legislative, administrative, and judicial obstacles to impede persons with intellectual disabilities from creating and maintaining families. This case directly implicates an issue of exceptional importance to millions of parents with intellectual disabilities.

This Court has long recognized that natural parents possess a fundamental liberty interest in the care and upbringing of their children. *Santosky v. Kramer*, 455 U.S. 745 (1982). Parents with intellectual disabilities, no less than other parents, have a fundamental liberty interest in having and raising children, an interest which may not be

extinguished on the basis of blanket legal presumptions about their status as unfit parents. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972). Nonetheless, parents with intellectual disabilities lose their children in state termination proceedings at an astonishing rate.[3]

This rate of termination cannot be explained by reference to the natural abilities of people with intellectual disabilities to act as parents. Researchers have demonstrated that with reasonable accommodation, people with intellectual disabilities can act as competent and loving parents.[4] The effort necessary to keep a family united could be as minor as providing a parenting plan in a comprehensible format or providing training in particular tasks such as diapering or food preparation.[5] Sadly, however, many States refuse to make even minor and manifestly reasonable accommodations. As a result, people with intellectual disabilities retain their parental rights to their children only at the sufferance of state agencies and state courts. Worse, this arbitrary and unreasonable state discrimination systematically deprives the children of such parents of their constitutional and natural rights to the undisturbed love and nurture of their parents.

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[3] David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 299-300 (2002) (estimating rate as between 40% and 60%).

[4] Maurice A. Feldman, *Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies*, 15 RES. DEV. DIS. 299, 301 (1994); Maurice A. Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning*, 24 J. INTELL. & DEVELOPMENTAL DIS. 27, 28 (1999)

[5] Feldman, *supra* note 4, at 310-12, 329; Feldman & Case, *supra* note 4, at 28, 38.

Neither Petitioners nor *amici* claim that every parent with an intellectual disability is entitled to retain custody of his or her child in every case. Like a physical disability such as blindness or paraplegia, an intellectual disability may indeed affect certain aspects of an individual's ability to parent. Petitioners and *amici* claim only that before acting to terminate parental rights, the State must do what the ADA requires: ensure that it has provided reasonable accommodation of the parent's intellectual disability, or that it has taken into account how the parent's capabilities could improve if reasonable accommodations were afforded.

As the decision of the Rhode Island Supreme Court exemplifies, many state courts are not willing to require such accommodations to be provided before the parent's inadequacy is adjudicated despite the clear contrary mandate of the ADA. As a clearly erroneous application of federal law on an issue of extreme importance to parents with intellectual disabilities and their children, this decision merits this Court's review and reversal.

REASONS FOR GRANTING THE PETITION

States have long placed substantial obstacles in the paths of persons with intellectual disabilities who seek to form families. Today, parents with intellectual disabilities are still subject to deliberate state-instigated discrimination in their enjoyment of the fundamental right to have and to raise children. This Court should grant review because only the application of the ADA to state proceedings directed at the termination of parental rights can protect families headed by parents with intellectual disabilities from discrimination by state courts and agencies.

1. In a particularly unfortunate chapter of this country's history, state legislatures motivated by eugenicist ideals sought to prevent persons with intellectual disabilities from forming families. By 1913, 24 States barred "imbeciles," "idiots," "lunatics," the "feebleminded," or those of "unsound mind" from marriage.[6] Many such laws remained on the books until recently.[7] During the same period, the States began to enact statutes authorizing the involuntary sterilization of "mental defectives." The Supreme Court endorsed this practice in *Buck v. Bell*, 274 U.S. 200, 205 (1927), a decision that ranks with *Plessy v. Ferguson*, 163 U.S. 537 (1896), as one of this Court's least defensible moments. In the decades following this decision, dozens of States implemented programs of compulsory sterilization by passing laws modeled on the statute upheld in *Buck*.[8] As of 1960, the States had sterilized over 60,000 people deemed to be "defective."[9] As late as the 1970s, several state statutes permitted termination of parental rights on a finding of mental retardation, without more. *See, e.g.*, *Helvey v. Rednour*, 408 N.E.2d 17 (Ill. App. Ct. 1980) (holding unconstitutional state statute that permitted the court to free for adoption, without parents' consent, the child of parents deemed mentally impaired).

2. Although state programs of involuntary sterilization have abated, the States remain hostile to the prospect of children being raised by parents with intellectual disabilities.

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[6] Phillip R. Reilly, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 26 (1991).

[7] Samuel J. Brakel, John Parry, Barbara A. Weiner, THE MENTALLY DISABLED AND THE LAW 532-38 (3d ed. 1985) (As of 1985, twenty-one states still prohibited marriage of persons who are "insane," "weak-minded," "imbeciles," or similar.).

[8] Reilly, *supra* note 6, at 45-55, 88.

[9] *Id.* at 94.

State animus towards parents with intellectual disabilities is writ on the face of dozens of state statutes authorizing termination of parental rights. In August 2005, at least thirty States expressly included "mental deficiency" or "developmental disability" as a ground for the termination of parental rights. *See* Pet. Br. at 21 & n.15. Although these statutes require some showing that the parent's intellectual disability will create an inability to discharge parental responsibilities, such statutes inevitably and impermissibly focus the court's inquiry on the parent's disabled status or condition rather than on her conduct towards her child. By analogy, consider a statute that would authorize termination of parental rights if a parent's *poverty* created an inability to discharge parental responsibilities. Such a statute would explicitly single out a parent's financial means as a predicate for a finding of neglect. Nobody could condone instigating an inquiry of parenting ability on the basis of a person's financial status *per se*. Where people with intellectual disabilities are concerned, however, many States do condone such status-based inquiries. As a result, it is only such people whose performance as parents is subject to scrutiny on a *per se* basis.

3. Apart from openly proclaiming discriminatory state animus, a termination of parental rights statute that mentions intellectual disability acts as a covert invitation to a state court to treat parents with intellectual disabilities unfairly. This invitation is all too often accepted. Judicial discrimination against parents with intellectual disabilities manifests itself in two guises. First, state courts frequently will terminate the parental rights of persons with intellectual disabilities with little or no cause, even as they leave children in the custody of their "normal" parents despite the presence of substantial evidence of neglect or abuse. As

commentators have noted, "injecting a parent's mental retardation into the calculus . . . result[s] in the application of higher standards of parenting than are applied to other parents."[10] Second, when dealing with parents with intellectual disabilities, state courts will presume that no improvement in parenting skills will occur, or that any improvement will be inadequate. *See, e.g., South Carolina Dep't of Soc. Servs. v. Humphreys*, 374 S.E.2d 922 (S.C. Ct. App. 1988). Troublingly, in making such determinations, state courts frequently rely on the testimony and conclusions of witnesses who appear to think that people with intellectual disabilities cannot or should not act as parents. *See, e.g., In re C.M.*, 556 P.2d 514, 518-19 (Wyo. 1976); *In re McDonald*, 201 N.W.2d 447, 449-50, 452 (Iowa 1972). By opening the door to testimony from biased observers, a statutory authorization to consider the impact of a parent's intellectual disability inevitably prejudices the parent.

4. Systematic discrimination by state courts, agencies, and legislatures against parents with intellectual disabilities has taken its predictable toll. Statistics indicate that children of parents with intellectual disabilities are removed from their parents with alarming frequency: researchers estimate that such children are removed from their parents at "unusually high rates, in the range of 40 percent to 60 percent."[11] Other research has demonstrated that this high toll arises from prejudice rather than from genuine concern over children's welfare. For example, in a study of 206 consecutive cases before a Boston juvenile court, researchers found that 31 of the cases, or over 15%, involved children from families

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[10] MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 271-72 (1999).

[11] McConnell & Llewellyn, *supra* n.3, at 297.

where one or both parents had an IQ lower than 79.[12] Disturbingly, the researchers found that despite the fact that the parents in this group had *less* prior court involvement and *greater* compliance with court-ordered services, these parents had their children removed as frequently as substance-abusing parents and *more* frequently than parents with no diagnosis.[13] As this study demonstrates, the parents with intellectual disabilities were subjected to stricter standards, and suffered harsher outcomes, than the other parents — a result symptomatic of systematic discrimination against such parents.

5. The termination of a parent's rights to his child is one of the most severe forms of action that a state entity can take. *Santosky*, 455 U.S. at 759. As the Petitioners have demonstrated, the ADA applies by its plain terms to termination of parental rights proceedings prosecuted by state entities in state courts. *See* Pet. Br. at 9-10. The ADA's purpose is to prevent individuals with disabilities from suffering purposeful, unequal treatment resulting from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a). When state courts target people with intellectual disabilities for harsher treatment during termination of parental rights proceedings, they violate the rights to equal treatment and to individualized assessment safeguarded to such parents by the ADA and engage in precisely the sort of discrimination that Congress intended to extinguish. With the provision of the

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[12] Carol G. Taylor, *et al.*, *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat Their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 395 (1991).

[13] *Id.* at 398.

reasonable accommodations required by the ADA, many parents with intellectual disabilities, including in all likelihood the petitioners in this case, could retain their rights to the care and nurture of their natural children. Only the application of the ADA to such determinations can protect parents with intellectual disabilities and their children from discrimination by state entities.

CONCLUSION

The Petition for certiorari should be granted.

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